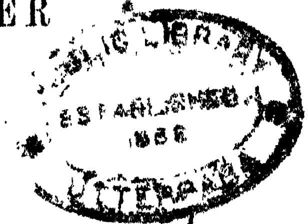
SPECIAL NUMBER



The Weekly Reporter,

'PELLATE HIGH COURT.

CONTAINING

FULL BENCH RULINGS,

From July 1862 to July 1864.

BY

D. SUTHERLAND.

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SPECIAL NUMBER

OF

The Weekly Reporter,

APPELLATE HIGH COURT.

The 21st July 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Commission for local Investigation—Procedure on default—Appeal.

Case No. 1 of 1862.

Regular Appeal from a decision of Mr. O. W. Malet, Judge of Beerbhoom, dated the 3rd October 1861.

Eshanchunder Chuckerbutty and another (Plaintiffs) *Appellants,*

versus

Soorjo Loll Gossain (Defendant) *Respondent.*

Baboo Onoocool Chunder Mookerjee for Appellants.

Baboo Shumboonauth Pundit for Respondent.

Where a plaintiff fails to appear before a Commissioner appointed under Section 180 Act VIII of 1859, and the defendant appears, the plaintiff is liable, as under Section 114, to have his suit dismissed with costs.

An appeal does not lie from such judgment by default. The proper course is to apply for an order to set aside the judgment, and, if that application be refused by the Judge, to appeal against his order of refusal.

THIS suit was brought to reverse a thakbust or survey proceeding, and to recover possession of certain lands alleged to be part of the plaintiff's putnee talook. The plaintiffs alleged that the defendant had caused the land claimed to be measured with a mehal released in Resumption Case No. 1370.

The defendant pleaded, amongst other things, that the plaintiffs, by shifting the boundaries, had wrongfully claimed the lands, and that the lands in dispute, with the exception of 19 beegahs belonging to other persons, were rent-free.

On the 4th day of August 1861, an order was issued to an Ameen for the purpose of making a local investigation under Section 180 of Act VIII of 1859. On the 8th of August 1861, the Ameen reported that the plaintiffs had not appeared either in person or by attorney; and, on the 10th of the same month, the Judge directed that the pleader of the plaintiffs should communicate to his clients that they must appear before the Ameen in person or by attorney; and the Ameen was directed that, if the plaintiffs should still make default, he might carry on the enquiry *ex-parte.* The plaintiffs afterwards applied to the Ameen for seven days' time to appear before the Ameen, which was granted; but the plaintiffs failed to appear before the Ameen at the time appointed by the enlargement. The defendant did appear, whereupon the Ameen, on the 26th day of August, reported that, although he had given them seven days' time, the plaintiffs had not appeared either in person or by attorney, and that he was unable to carry on the enquiry *ex-parte,* inasmuch as it involved a measurement of the lands in dispute, and that, without somebody on the part of the plaintiffs to point them out, he was unable to carry out the order of the Court. On the 27th August the Court ordered the Ameen to return from the Mofussil. On the 3rd October 1861 the parties appeared before the Court, and the judgment stated that the only excuse offered by the plaintiffs for this default was that, when they first went, the Ameen was not present, being absent from sickness; then that the Ameen was employed on other duty; then that there was delay in attesting the mookhtearnamah. But no evidence was given in support of these excuses, and the Judge, under Sections 180 and 114 of the Act, directed the case to be dismissed with costs.

The return of the Ameen by Section 180 was *primâ facie* evidence, and, the plaintiffs not having offered evidence to disprove it, it must be taken as true. The plaintiffs have appealed from

the decision of the Judge upon the ground that Section 114 is not applicable to the case, as the plaintiffs were present in the Judge's Court by means of their vakeel; and, secondly, that as the plaintiffs were not summoned, either to give their own depositions or to produce their witnesses, Section 180 was not applicable to the case. These are the points for determination, and the decision depends upon the proper construction to be put upon Sections 180 and 114 read together. Section 180 enacts that—"In any suit in which the Court may deem a local investigation to be requisite or proper for the purpose of elucidating the matters in dispute, the Court may issue a commission to an officer of the Court appointed to execute such commission, or, if there be no such officer, to any suitable person, directing him to make such investigation and to report thereon to the Court. In all such cases, unless otherwise directed by the order of appointment, the Commissioner shall have power to examine any witnesses who may be produced to him by the parties or any of them, the parties themselves, and any other persons whom he may think proper to call upon to give evidence in the matter referred to him; and also to call for and examine documents and other papers relevant to the subject of enquiry; and persons not attending on the requisition of the Commissioner or refusing to give their testimony, &c., shall be subject to the like disadvantages, penalties, and punishments, by order of the Court on report of the Commissioner, as they would incur for the same offences in suits tried before the Court." The second ground of appeal is founded on the assumption that the words of Section 180—"and persons not attending upon the requisition of the Commissioner"—apply only to persons called upon to give evidence, or to parties required to give their own evidence or to produce their witnesses. But there is nothing in the context to require such a limited construction to be put upon those words. The words are general, and reason and convenience require that parties making default before a Commissioner, whether required to give evidence or not, should be subject to the same disadvantages for non-appearance as they would be for default of appearance before a Judge. In many cases it will be impossible, as it was in the present case, for a Commissioner to proceed with a local investigation without the attendance of the plaintiffs, either by himself or his agent. There is nothing in the Act to show that the Commissioner may proceed with the enquiry *ex-parte* on the default of the attendance of a plaintiff; and even if a party were to give evidence before a Commissioner, it is very doubtful whether he could be dealt with under Section 168 or Section 169. In case of his neglecting to attend, or refusing to give evidence if present, the remedy in such a case would be to apply for judgment against him under Section 170; but this remedy is not given by Section 170 alone, but by virtue of that Section incorporated with Section 180, which subjects him to the same disadvantages as if he failed to appear or refused to give evidence before the Court. In the present case, if the plaintiff had been required to attend and give evidence, he would have been liable, in case of non-attendance or refusal to give evidence, to the disadvantage pointed out in Section 170. If the defendant had failed to appear before the Commissioner, and the plaintiff had appeared, the Commissioner might have proceeded *ex-parte* under Section 180 incorporated with Section 114. But where a plaintiff fails to appear before a Commissioner, and the defendant, as in the present case, appears, the disadvantage to which the plaintiff is subject is that pointed out by Section 114. If that were not so, a suit might never be determined if a local investigation were requisite, and the presence of the plaintiffs was necessary, to enable the Commissioner to proceed. For what could be done? The defendant would not be forced to make out his case; and in the absence of the plaintiff who is the actor in the suit, the Commissioner could not proceed. The case might go back to the Judge, but without a report upon the merits, and both he and the parties would be in the same position as they were when the local investigation was first ordered. If another local investigation should be ordered, the plaintiffs might again make default, and there would be no end of the matter. We are therefore of opinion that, reading Sections 180 and 114 together, the plaintiff was liable to the like disadvantage as that pointed out by Section 114, *viz.* to have his suit dismissed with costs.

It is somewhat doubtful whether an appeal lies in such a case as the present. Section 119 enacts that no appeal shall lie from a judgment passed *ex-parte* against a defendant who has not appeared, or from a judgment against a plaintiff by default for non-appearance; and that, in all cases of judgment against a plaintiff by default, he may apply, within thirty days from the date of the judgment, for an order to set it aside; and, in all appealable cases in which the Court shall reject the application, an appeal shall lie from the order of rejection. There may be some doubt whether this Section applies to judgments by default for non-appearance before a Commissioner, or only to cases of judgment *ex-parte* or by default for non-appearance before the Court. In the case of non-appearance before the Commissioner, it seems scarcely necessary to require an application to be made to the Judge to set aside a judgment passed by the Judge on account of non-attendance before the Commissioner, when the party has actually, as in the present case, appeared before the Judge, and urged his excuse for non-attendance before the Commissioner. But although we think that there is no sufficient ground for appeal in this case, even if an appeal lies, and might determine the case upon that point alone, we are of opinion that it is better to determine the question whether an appeal does or does not lie in such a case, rather than leave the question in doubt for future cases. Now considering that the words of the 119th Section are general, and that an appeal will lie from an order rejecting an application to set aside a judgment by default, we think it safer to adhere to the words of the Section, and to hold that a

appeal does not lie from a judgment by default or non-appearance before a Commissioner, and that the proper course is to follow the procedure pointed out in that Section, *viz.* to apply for an order to set aside the judgment, and, if that application be refused by the Judge, to appeal against the order of refusal. We think that the "like disadvantages," referred to in Section 180, in the case of the non-appearance of a party, are, in the case of a defendant, to have the local investigation proceeded with *ex-parte*, and in the case of a plaintiff, to have his suit dismissed with costs. But we are also of opinion that if, in the case of a petitioner, the Judge orders his suit to be dismissed, an application, under Section 119 of the Act, may be made to set aside the order, and that, in the event of the Judge's refusing to set aside the order, an appeal lies against the order of rejection. The plaintiff is now too late to apply to the Judge for an order to set aside the judgment by default, thirty days and more having expired since the date of the judgment. We should regret this very much if we thought that there would have been any reasonable grounds for the application, if it had been made in time. But this is not the case, as the plaintiff has already had an opportunity of urging before the Judge his grounds of excuse for not attending before the Commissioner. It was no part of the Judge's order that the plaintiff should be informed that the Commissioner would proceed *ex-parte* in the event of his non-attendance. The direction seems to have been merely to the Commissioner that he might proceed *ex-parte* if the plaintiffs should continue to make default. In this respect we think the Judge was wrong, the defaulting party being a plaintiff and not a defendant. But it does not appear that the plaintiff was ever informed of this direction to the Commissioner: he clearly was not misled by it, and most certainly he never urged this to the Judge as an excuse for his non-attendance, or to show that he was misled as to the consequences which would result from his non-appearance before the Commissioner.

The appeal must be dismissed with costs and interest at 12 per cent. on the amount of such costs from this date until the realization thereof.

The 18th July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Joint Hindoo Family—Use of one brother's name.

Case No. 15 of 1859.

Regular Appeal from a decision of Baboo Punchanun Banerjee, Principal Sudder Ameen of Rajshahye, dated the 18th July 1859.

Kishen Komul Singh and others (Defendants) *Appellants,*

versus

Janokee Dossee and others (Plaintiffs) *Respondents.*

Baboos Bungsheebuddun Mitter and *Shumboonauth Pundit* for Appellant.

Moonshee Ameer Ally and *Baboos Kishen Kishore Ghose* and *Bhoobun Mohun Roy* for Respondent.

Suit laid at Co.'s Rupees 36,611-8*a.*-11*g.*-3*c.*

In a joint Hindoo family, the mere use of one brothers' name in documents relating to property affords no presumption of his being sole proprietor; particularly where he is the eldest brother or the managing member of the family.

The defendant Kisto Komul Singh, appellant in this case, was the second of three brothers forming an undivided Hindoo family possessed of considerable wealth as traders and zemindars.

The plaintiffs were widows: Janokee of the eldest Ramcomul, and Bissessurie of the youngest brother Gobind Chunder. Of these two brothers, the elder died in the Bengalee year 1239, the younger in 1250.

The widows brought this action to recover the shares of their deceased husbands in the family property, from which they alleged they had been dispossessed by Kisto Komul, the defendant.

The defendant pleaded several pleas, but principally that of separate acquirement from his private resources; and as to a part of the estates, Kisto Komul's wife, Bhoobun Moyee, appeared and answered that they were her sole property purchased from her Stridhun.

The Principal Sudder Ameen, in a very elaborate and well considered judgment, declared these various pleas unfounded, and except as to certain gold and silver ornaments and a cash balance, in respect of which the plaintiff had not given sufficient evidence, decreed to them each one-third share in the landed property, trading concerns all but one, and premises in dispute.

The defendant comes up in appeal on the merits of the case, urging that in a long course of transactions from the year 1241 down to 1260, all purchases, dealings, receipts for rent, and other papers are in his name alone, without allusion to his brothers or their widows.

Being desired by the Court to point out the separate resources from whence this extensive property was acquired by the appellant, his pleader mentions the gifts received by him in the ceremony of "Annaprasun" and at his marriage, which he states were carried to a separate account, and were the foundations of his fortune; and he points to the appellant's series of khatas, opening with a sum of Rs. 200 in hand.

We have to observe, however, that it has been settled by repeated decisions that, in a Hindoo family where commensality is admitted, the mere use of one brother's name in documents relating to property affords no presumption whatever of such brother being sole proprietor, more especially where, as in the present case, that brother has been, during the whole period embraced in the transaction, both presumably as the eldest surviving brother, and as distinctly shewn by the evidence, the managing member of the family.

And as to the account, not only is there no authentic record of the first receipt and

separate allocation of the sums referred to as defendant's private means, but the allegation is absurd upon the face of it.

The defendant, when he is supposed to have received these gifts, was not the eldest, but the second son. The actual eldest, Ramcomul, as observed by the Principal Sudder Ameen, would, no doubt, have received much larger sums on the two occasions of "Annaprasun" and of "Shadi;" the third brother would also have received his gifts; and yet we are to suppose that the sums conferred on the second brother alone were set aside and reserved for his benefit.

On this, then, and on the other points connected with the evidence and set forth in the judgment of the lower Court, no reason whatever has been shewn for differing from the conclusion arrived at there; and we accordingly dismiss this appeal with costs.

The 19th July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Adoption—Descent.

Case No. 31 of 1859.

Regular Appeal from a decision of Mr. H. Atherton, Judge of Sarun, dated the 7th July 1859.

Sreegobind Singh (Plaintiff) *Appellant,*

versus

Odit Narain Singh (Defendant) *Respondent.*

Baboo Kissen Succa Mookerjee for Appellant.

Baboo Dwarkanauth Mitter for Respondent.

Suit laid at Co.'s Rupees 5,617-2*a*.-1½*p*.

A distinct suit for the recognition of an adoption having totally failed, the plaintiff is not entitled to fall back on his right by descent.

THE plaintiff sues to establish his right to one-half of the ancestral property of his family and to one-half of a share in two villages, named Rugbah and Rajpore, purchased with the profits of the ancestral estate.

This case rests on an adoption by his uncle. Hunoman Singh and Kamola Kant Singh were two brothers. The latter had four sons, of whom the plaintiff was one. The former brother being childless, adopted his nephew, the plaintiff, who, it is stated, has been in possession of his share, in right of the adoption, since his majority, to which he attained in 1240; and his prayer is that his right in half the family property be finally declared, and that certain monies not accounted for by the father of Odit Narain, who managed the property, be restored to him.

The Judge has discredited the story of the adoption altogether, and has dismissed the suit, for what appear to us very valid and conclusive reasons.

The alleged adoption by Hunoman Singh, together with the subsequent guardianship of the plaintiff by the widow of Hunoman, the ceremony of his *choorakurn* or tonsure, usual with Hindoo boys, and his marriage, as well as his receipt of profits of the estate, rest wholly on the evidence of sundry witnesses to these facts, being a brahmin, a sweetmeat seller, a barber, and an oilman.

No deed of adoption is produced; there is no positive mention of the fact of adoption, and no assertion of the same in any document put forth in any Court or before any official for the space of nearly forty years. None of the respectable members of the family said by the above witnesses to have been present at the gathering of the family, are called to depose to these facts, of which, if true, they could not possibly be ignorant; and even the son of the deceased family priest, who appeared at the ceremonies, is not summoned.

In fact, the whole case rests on the oral evidence discredited by the Judge, improbable on its face, and wholly inadequate, under the circumstances, to prove such a claim.

We, therefore, have no hesitation in dismissing the claim to one-half of the ancestral estate; and this being discredited, the claim to one-half in the two villages said to have been purchased with the profits of the ancestral property, goes with it.

It was urged that, if the share under the alleged adoption be disallowed, the plaintiff is entitled to a declaration of his rights, under the usual law of inheritance, to one-third of the family estate; but we are of opinion that a distinct suit for the recognition of an adoption having totally failed, the plaintiff can have no right to shift his ground and to fall back on his right by descent. We cannot entertain this claim.

The appeal is dismissed with costs.

The 22nd July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Possession—Attachment—Resumption.

Case No. 378 of 1859.

Regular Appeals from a decision of Mr. F. A. Glover, Officiating Judge of Rungpore, dated the 16th April 1859.

Ranee Surnomoyee (Plaintiff) *Appellant,*

versus

The Collector of Rungpore and others (Defendants) *Respondents.*

Moonshee Ameer Ally, and *Baboos Shumboonath Pundit* and *Ashootosh Dhur* for Appellant.

Baboo Jugdanund Mookerjee for Respondents.

Case No. 408 of 1859.

The Collector of Rungpore (Defendant) *Appellant,*

versus

Ranee Surnomoyee (Plaintiff) *Respondent.*

Baboo Jugdanund Mookerjee for Appellant.

Moonshee Ameer Ally, and *Baboos Shumboonath Pundit*, *Ashootosh Dhur*, and *Sreenath Doss* for Respondent.

Suit laid at Co.'s Rupees 3,49,683-13-4.

The Government having seized certain chur lands and dispossessed the proprietor in possession, and having entirely failed to establish any claim for assessment or resumption during the period of attachment following the dispossession of the proprietor,—Held that the Government must be regarded as a wrong doer for the whole period, and must account to the proprietor for all the collections made by its officers up to time of restitution.

THE plaintiff in this suit is the proprietor of Baharbund, and claims from the Government the restitution of 9,000 beegahs of chur lands, possession of which was taken by the Government in 1851. Plaintiff also claims a refund of all collections made by the Government on account of these lands, during a period extending from 1819 up to the present time of action, with the exception of a few months, during which Government allowed the plaintiff to hold possession previous to her final dispossession in 1851.

The circumstances which gave rise to the present action date so far back as the year 1817. They are detailed at length in the pleadings; are not disputed; and the following is an abstract of the case for so far as is necessary to the understanding of it as laid before us.

The plaintiff's estate of Baharbund lies on the west bank of the great Brahmapootra river, and the then proprietor of Baharbund being in possession of some chur lands in that river, a dispute arose between the plaintiff's predecessor and the proprietor of the Kuroburea estate on the opposite side of the Brahmapootra, regarding the right to some of these lands, which led to a suit in Court terminating in a decree in favor of the Baharbund zemindar on the 17th February 1816. An appeal was then preferred to the Judge, who, in upholding the judgment of the first Court, recorded an opinion that, as the greater part of the lands comprised in these churs appeared to have been formed since the Decennial Settlement, they could not have been brought under assessment at that time, and directed a copy of his decision to be forwarded to the Revenue authorities for their information and for such further proceedings as the Revenue authorities might think right to take. Upon this information the Collector, under orders of the Board, at once acted by calling upon the proprietor of Baharbund in the person of his manager (the estate itself being under the Court of Wards), to settle for the chur lands in his possession, and, on his failing to appear and make any offer, the Collector dispossessed the manager and took possession of the entire tract of chur there existing, on the part of Government. This took place in the year 1818. In the following year Regulation II of 1819 was passed, which prescribed a general law of procedure to be followed in all cases of resumption; and in 1824 a suit was filed on the part of Government, under the provisions of that law, for the resumption of these lands as against the proprietor of the Baharbund estate. The Government officers, however, continued to hold possession of the lands and collected the rents as heretofore. Thus matters remained until the promulgation of Act IX of 1847, when the Collector of Rungpore, in conformity with a general order issued by the Board of Revenue for the abatement of all suits for the resumption of alluvial lands then pending, struck off the suit relative to the lands in question, and restored them to the possession of the zemindar. The proprietor, having thus recovered possession without the Government having established any title to resume or assess these lands, deemed himself entitled to the wasilat enjoyed by the Government during the period of his dispossession, and sent in a demand for the amount with interest. This demand the Government resisted, and, on the assumption that the alluvial lands had been declared, in the Zillah Judge's decree, to constitute an island in the river Brahmapootra, and that the proceedings commenced under Regulation II of 1819 contemplated the establishment of Government's sole and independent right to the lands in question, and not merely a right to assess them as an accretion to some part of plaintiff's estate, the Board of Revenue instructed the Collector that their Circular Order, under Act IX of 1847, was not intended to apply to such cases on the resumption file, and directed him to dispossess the proprietor and to take possession of the lands again on the part of Government. This was accordingly done in the year 1851; and the present suit is to establish plaintiff's right to hold possession of these lands, a portion of which, it is averred, were in existence at the time of the Decennial Settlement, and were settled with the plaintiff as belonging to the Baharbund estate; while the remainder, having subsequently accreted either in the place of lands previously carried away or as additions to the original lands, constitute, it is argued, in either case, part of plaintiff's Decennial estate, from which the Government, in vindication of any assumed alluvial rights, has no right to dispossess her.

The Collector's defence first pleads limitation as a bar to the suit, and then asserts generally the legality of the acts done by the Government officers in dispossessing the plaintiff, and finally admits her right to have so much of the land as is recorded in the quinquennial papers of 1203 Fusli, as pertaining to the Baharbund estate at the time of the Decennial Settlement, and computed in those papers at 830 beegahs; requesting that a decree may be passed for that quantity, and that Government may be allowed proportionate costs in the suit on the rest of the land sued for.

Several issues were proposed for trial by the Judge, but it is only necessary to notice such as bear upon the real point to be decided in this case—namely, whether the Government officers were justified in dispossessing plaintiff of the chur lands, either in the first instance in 1817, or in the second time in 1851.

The plaintiff assumes that the rights exercised by Government could not be justified, as the chur lands were merely accretions upon her permanently assessed lands, and that whatever right the Government might have, *quoad* the assess-

ment of such lands, her title to retain possession could not be affected until she had rejected the Government offer of settlement.

The issue which determined below the precise nature of plaintiff's lien on the lands is set forth in the lower Court's judgment as follows:—Is the disputed land the Shikustee Pywustee of lands belonging to the plaintiff's zemindaree, pergunnah Baharbund; and was it formed before or after the period of the Decennial Settlement? The issue so proposed is thus determined by the Judge in the plaintiff's favor. He says :—"I consider it satisfactorily proved, both by oral and documentary evidence, that there always remained a portion of some of the villages, and that churs gradually formed on the site of the land which had been carried away by the river. The quinquennial papers of 1202 B. S., the reports of the different officers employed in the case, and the decision of the Civil Court, appear to me to establish so much of the plaintiff's case;—*i. e.* that the villages mentioned in the plaint were not entirely carried away, but that there remained a portion, to which, in after years, a large quantity of land accreted. There is no evidence to show how much of the claim accreted at the time the Permanent Settlement was made; but it is clear that the land now in dispute joins on to the land mentioned in the Government records as being part of that settled with the zemindar of Baharbund. Government, in its reply to the plaint, admits the plaintiff's claim so far, and agrees to a judgment for an amount of land equal to the proved area of the washed-away villages. According to the provisions of Regulation XI of 1825, Section 4, Clause 1, the chur in dispute must be considered an increment to the village or villages permanently settled with the zemindar of Baharbund, and be decreed to him, so far as foregoing rights go, accordingly.

The Judge, having thus determined upon the evidence before him that a portion at least of the lands in dispute constituted the lands of villages for which a Permanent Settlement had been concluded with the zemindar, proceeded to enquire into the legality of the acts by which the plaintiff had been displaced from possession in 1818; and, finding that the zemindar's manager had been dispossessed without having any opportunity offered him of proving the proprietor's rights or title to the churs, held the dispossession to have been effected without the authority of law, and that the plaintiff was entitled to wasilat for such land as was in existence at the time of ouster; but he gives no wasilat for the period of plaintiff's second dispossession, which the Judge considered legally consistent with the provisions of Act IX of 1847. The result of the judgment, therefore, is, that plaintiff recovers possession of only 830 beegahs and some odd cottahs as his *usulee* land, and wasilat on the chur lands (about 8,000 beegahs) in existence, as attached thereto in 1818, from the period he was dispossessed up to 1848, with costs in proportion to his decree.

From this decision both the Government and the plaintiff have appealed: the Government on the ground that the suit should have been dismissed upon limitation, and that plaintiff can, under no circumstances, recover wasilat; while the plaintiff still urges her right to the possession of all the lands now in existence as increments to her estate, and that the Government is, moreover, bound to account to her for the entire collections during the whole period of its wrongful possession of the lands in dispute.

We are clearly of opinion that the Government can have no assistance from the law of limitation. It is true that the wrongful act complained of by the plaintiff dates as far back as the year 1818, and that the present suit was only commenced on the 11th January 1854. But it is admitted by the Government officers that a suit was instituted by the Collector for the resumption and assessment of these lands under Regulation II of 1819 in the year 1824, which only abated under orders of the Collector in 1848; and we are of opinion that, so long as the suit was pending as a Resumption Case, plaintiff was not at liberty to seek redress in the ordinary Courts' law. Hence it follows that no limitation can be said to run against her during all these years; and when the opportunity again arose by the abatement of the suit, the necessity of a suit was obviated by Government restoring the property and the authorities entertaining her application for a refund of the wasilat. The same cause of action only again accrued when plaintiff was a second time ousted from the lands, and her application for refund of the collections finally refused. The plaintiff's action, therefore, is quite within time.

Upon the general merits of the case, we think there can be no doubt that the plaintiff is justly entitled to recover possession of the entire lands in dispute.

The admission in the defence leads to the conclusion that, when the plaintiff was ousted in 1818, the proprietor of Baharbund was in possession of a certain quantity of permanently settled land belonging to villages for which engagements had been entered at the time of the Decennial Settlement. To the possession of such lands the proprietor's title was undoubted; and by the custom of the country, since confirmed and declared by positive enactment, the proprietary right extended to all alluvial accretions which might subsequently form thereon, while the fact that Government has all along proposed to pay to the proprietor malikhana allowance upon all collections, is in itself a strong admission of plaintiff's proprietary right in the lands that have so accreted to the parent estate, and tends to support the plaintiff's assertion that the churs are increments to the Baharbund estate. It can be no excuse for the acts of the Government officers that the lands, or some portion of them, was liable to assessment as fresh increment to the plaintiff's estate.

The existence of such a claim on the part of Government will not justify acts of spoliation and ouster, and the liability of these lands, as new formations for the payment of Government reve-

nue, can be no defence for their engagement and appropriation without authority of law.

The plaintiff is, therefore, entitled to recover possession of all the chur lands now sued for, both *usulee* and those of recent formation, whether more or less than the quantity existing in 1818, as the whole must be considered a gradual accretion to the Baharbund estate. Government, moreover, having seized the lands and dispossessed the proprietor in possession, and having failed to establish any claim for resumption or assessment during the long period of attachment following the dispossession of the proprietor, must be regarded as a wrong-doer during the whole period, and must account to the plaintiff for all the collections made by its officers since 1817 up to the time of restitution, with interest upon the collections from September 1848, the date when plaintiff first demanded them; and, with the exception of such time as plaintiff was in possession, any further collections made subsequent to 1848 must be restored to the plaintiff.

Plaintiff also receives the costs in the Court below, and for these appeals, in proportion to the amount now decreed to her.

The 23rd July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Onus probandi (Suit for possession of land attached under Section 3 Act IV of 1840.)

Case No. 32 of 1859.

Regular Appeal from a decision of Mr. J. Weston, Principal Sudder Ameen of Tirhoot, dated the 20th July 1859.

Maharajah Moheshur Singh (Defendant) *Appellant,*

versus

Baboo Ramaput Singh (Plaintiff) and others (Defendants) *Respondents.*

Baboo Unnoda Persad Banerjee and *Moonshee Ameer Ally* for Appellant.

Moulvie Aftaboodddeen Mahomed for Respondents.

Suit laid at Co.'s Rupees 4,772.

In a suit for possession of land attached by the Magistrate under Section 3 Act IV of 1840, the *onus probandi* is on the plaintiff.

This was a suit to obtain possession of land held under attachment by the Magistrate after enquiry according to Section 3 Act IV of 1840.

The suit originally comprised a claim for 575 beegahs; but in regard to 337 beegahs of this whole area, the Principal Sudder Ameen and the late Sudder Court* in appeal, both held that the plaintiff's suit was barred by Act XIII of 1848, in consequence of his having allowed more than three years to elapse before suing, after an adverse award by the Survey Authorities.

But the Sudder Court ordered a trial on the merits as to the remaining 238 beegahs, which, it found, were not affected by the award. The Principal Sudder Ameen has now given the plaintiff a decree for these 238 beegahs; and the defendant appeals, on the ground that the burden of proof was not fully and fairly laid, as it ought to have been, on the plaintiff; that evidence was improperly admitted; and that the decision of the lower Court is against the weight of the evidence legally before it in this case.

We find all these objections to the Principal Sudder Ameen's decision to be sufficiently established.

The lower Court observes that, as the lands are under attachment, the defendant, equally with the plaintiff, is bound to prove his title; but we are not shown upon what authority this doctrine rests.

The Principal Sudder Ameen appears to have considered the enquiry in this suit analogous to an enquiry under Section 2 Act IV of 1840, where all parties concerned in a dispute as to lands are required to appear and show their claims to actual possession. This analogy, however, does not hold; and we consider that the fact of lands being under attachment does not absolve the plaintiff from the necessity of clearly proving his title to lands which, being out of possession, he sues to recover, nor justify the Court in giving him a decree because the defendant fails to make out his counter claim.

In regard to the documentary evidence enumerated by the Principal Sudder Ameen as supporting the plaintiff's title, we observe that the whole of it, with the exception of certain depositions last mentioned, consists of decisions or proceedings in previous litigations, to which the defendant was no party. This is not legal evidence against the defendant; and the Principal Sudder Ameen's observation that, if the defendant had any rights, he would certainly have intervened in the course of such proceedings, has no force.

All that remains on the plaintiff's side is the oral evidence given at the trial, and copies of depositions given by witnesses (apparently now deceased) on the previous trial, which ended in a nonsuit.

We have heard as much of that evidence read as the respondents' pleader wished to lay before us; and we find that it is the kind of testimony invariably produced in such cases, the witnesses being defendants of the party for whom they appear, and speaking to figures and dates with a precision quite unusual except in the case of tutored witnesses.

Against this testimony, moreover, is the report of enquiry made by the Court Ameen, and accompanied by a map of the locality in dispute, which report is wholly in favor of the defendant.

This report was evidence, and very material evidence, in the suit; and as it is not impugned on any ground of partiality or mistake, we think it, in a case of boundaries, entitled to even

* S. D. A., 1857, p. 1935.

greater weight than the oral evidence given at the trial, certainly greater than the evidence of such witnesses as those whom the plaintiff adduced.

The Principal Sudder Ameen simply observed that, as the plaintiff's claim has been proved by evidence, documentary and oral, the Ameen's report, which is founded on oral evidence only, "cannot preponderate."

We have shewn that the documentary evidence was not evidence at all; and we point out that the oral evidence, of which the lower Court speaks, was not of a kind to outweigh the Ameen's report.

In this state of things, the precedent* referred to by the Principal Sudder Ameen, as fortifying his decision, is wholly favorable to the defendant, being to the effect that the testimony of witnesses who speak to the dispossession of plaintiff, and to his possession at and previous to the date of dispossession, being unsupported by any documentary proof, is not to be relied on, and is quite insufficient to prove the title set up by the plaintiff.

Holding, therefore, that, as urged by the appellant, the decision of the lower Court was unsupported by legal evidence, we reverse that decision, and decree the appeal, with costs.

The 25th July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Onus probandi (Suit for possession).

Case No. 3 of 1859.

Regular Appeal from a decision of Baboo Taruckuath Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated the 18th June 1859.

Baboo Kirat Singh (Plaintiff) *Appellant,*

versus

Ram Doss and others (Defendants) *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Kishen Kishore Ghose and *Ashootosh Dhur* for Respondents.

Suit laid at Co.'s Rupees 5,240-10.

Suit for possession under the allegation that the property in dispute was under the management of the defendant. The defendant having denied management and set up a title by purchase, and his possession for more than 30 years having been proved,—Held that the onus of showing a possession for his benefit was rightly thrown on the plaintiff.

This is a claim for certain houses and a garden situated in the suburbs of Calcutta, dismissed by the lower Court.

The plaintiff's case is that he habitually resides in Purneah, and that the property for which he sues was managed, first, for his father and mother, and, after his parents' decease, for him by the defendant, Ram Doss.

* S. D. A. 1857, p. 467. Hurrokinkur Mozoomdar and others, appellants.

The principal defendant, Ram Doss, denies any management on behalf of the plaintiff, and sets up a title to the property under a conveyance from the father of the plaintiff, dated so far back as 1821.

The lower Court has dismissed the suit on the grounds that the plaintiff has not adduced any proof that the defendants ever were in possession of the property in the character of managers or trustees; that he has not shown that he erected a temple of Shiva in the garden, as alleged by him, in the year 1853; and that the law of limitation, as ascertained from the facts of the case, directly applies thereto. In appeal it is chiefly urged upon us that the burden of proving a right and title in the property should be thrown on the defendants, whose deed of sale the lower Court was inclined to think a doubtful one. But it appears from the answer of the defendants, whose possession for more than thirty years is not disputed, that they have never admitted any management or trusteeship on behalf of the plaintiff or of his father. On the contrary, they have directly traversed this allegation of the plaintiff, and it is not for them to be called on to show their title before the plaintiff has clearly shown the possession on their part to have been, at some time, a possession for his benefit.

Now, the only evidence as to management by the defendant, on the plaintiff's behalf, consists in the deposition of one Doorgapersad Roy, who declares that he used to look after the garden and buildings on behalf of the plaintiff till about 9 years ago, when the plaintiff left off consigning indigo to him, and he had thus no funds to pay the servant who looked after the garden, or to defray other expenses, it having been his practice to deduct the funds necessary for management from the price of the consigned indigo. But this evidence is very inconclusive and unsatisfactory. No documents are produced by the witness, or by the plaintiff as received from the witness; though the latter states himself to have sent in yearly accounts of his trust, and to have paid the Government revenue; and there is really nothing to lead us to think that he even knows the exact situation of the house and garden. His evidence, moreover, is at variance with the statement in the plaint, that the witness managed the property *in conjunction* with two others, Ram Doss the defendant, and one Kali Persad who is dead.

Other evidence to title or to the nature of the possession by the defendants alleged by the plaintiff, there is literally none; and deeming the evidence of a single witness wholly inadequate to establish such a claim, we have no hesitation in affirming the decree of the lower Court, and dismissing the appeal, with costs.

The 28th July 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Case No. 29 of 1859.

Leases (Unlicensed transfer of)—Effect of.

Regular Appeal from a decision of Mr. O. W. Malet, Judge of Beerbhoom, dated the 16th July 1859.

Messrs. Gordon, Stuart and Co. (Plaintiffs) *Appellants,*

versus

Mr. C. B. Taylor and others (Defendants) *Respondents.*

Baboo Shumboonauth Pundit for Appellants.

The Advocate General and *Mr. R. T. Allan* and *Baboo Jugdanund Mookerjee* for Respondents.

Suit laid at Co.'s Rupees 5,975.

The plaintiffs are mokurreree lease-holders, prior to whose lease the proprietor granted a pottah of the same land to A with a stipulation that A should not let the land to others without leave. A afterwards, with the proprietor's consent, sold his lease to B, who again, without license, sold his rights to the defendants. The plaintiffs sue to eject the defendants as trespassers. HELD that as there is nothing in the condition on which the plaintiffs (as exercising the proprietor's rights) rely that implies right of re-entry upon the land in case of a breach of that condition, the only effect of the want of consent on the part of the plaintiffs to B's sale is to maintain unimpaired B's liability to the landlord, without reference to the arrangement between B and any other parties.

THE plaintiffs (appellants) in the case, who represent the Bengal Coal Company, come into Court as mokurruree leaseholders of mouzah Terpashi, a rent-free estate of Hurrinauth Kurr and Hurrinarain Dutt. They sue Mr. C. B. Taylor and the Secretary to the East India Coal Company, who are in occupation of 61 beegahs of land within that mouzah. The ground of action is that, whereas the proprietor did, before the period of their lease, grant a pottah of the land in question to one Mr. Soiley, with a stipulation that he should not let the land to others without leave, the said Mr. Soiley did afterwards, without such permission, sell his lease to Ramchunder Mitter, who again sold his rights to the present defendants. It is alleged that, consequently, the defendants now in occupancy are mere trespassers, and plaintiffs claim the right to eject them from the lands accordingly.

The Zillah Judge dismissed the suit on several grounds: *first*, that plaintiffs, not having produced their own mokurruree lease of the whole mouzah, had failed to show their right to oust the defendants; *second*, that the sale by Mr. Soiley to Ramchunder Mitter was shown to have been made with the license of the proprietor; *third*, that the transfer by Ramchunder to the present defendants was not a sale but a conveyance (a distinction which the Judge has omitted to explain), and that such transfer did not require the consent of the proprietor.

The plaintiffs appeal against this judgment.

The fact that plaintiffs are mokurrureedars of the village is now admitted; the fact that Hurrinauth Dutt did, by his letter, dated 25th Srabun 1257, filed in the record, give his consent to a sale by Mr. Soiley, is also now undisputed.

The questions, therefore, which remain for decision are, *first*, whether Ramchunder's sale to the now defendants was made under license; *second*, whether, if it were not, the plaintiffs were entitled to oust them.

Upon the first of these points, we are of opinion that no license has been made out. The learned Advocate-General for the respondents pointed to the letter of Hurrinauth above referred to, which, he contended, was a dispensation, for all time, with the condition of obtaining consent.

We do not, however, look upon the document in this light. This is not a case where the pottah forbade sale or transfer absolutely, and where the proprietor had, notwithstanding, winked at a single act of sale. It is not even a case where the proprietor, having stipulated for consent, had, notwithstanding, recognized a first transfer made without his consent. The case is simply that, as to the transfer by Mr. Soiley, the proprietor, under particular circumstances, gives, in anticipation, consent, promising to admit Mr. Soiley's vendee, whoever he might be. This letter, therefore, is scarcely so much a dispensing with the condition *pro hac vice*, as a permission to observe it for that time in the way least embarrassing to the tenant; and we consider that the person who then came in under purchase from Mr. Soiley, holding Mr. Soiley's pottah, succeeded precisely to Mr. Soiley's position, rights, and disabilities.

We have next to determine whether, in this state of things, the plaintiffs are entitled to oust the defendants. In the first place, as to the plaintiffs' own title, we think that the failure to produce their lease was not really a matter of any moment. They are confessedly mokurrureedars, and the whole of their claim in the present suit is to deal with the tenants according to the terms of their several engagements. That a right so obvious and universal should be withheld from the plaintiffs, is a proposition so extraordinary that the Court cannot accept it without actual proof. It is not shown that the defendants took any step to compel the production of the lease for this particular purpose, or that they sought to prove this allegation in any other way. We, therefore, presume that plaintiffs have the same right as other ordinary middlemen between the proprietor and the actual occupier of the soil.

The final question, therefore, is, whether, in the circumstances of the case, the proprietor, or the plaintiffs as exercising his rights, can oust the defendants.

We find, in the condition on which the plaintiffs rely, nothing that implies right of re-entry upon the land in case of a breach of that condition. The only effect, in our opinion, of the want of consent on plaintiffs' part, is to maintain, unimpaired, the liability of the last licensed acquirer towards the landlord, without reference to the arrangement between him and any other parties.

Upon this ground we consider that the judgment of the lower Court should be affirmed, and we dismiss the appeal, with costs.

The 28th July 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Ejectment—Receipt of rent

Case No. 39 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. M. Beaufort, Officiating Judge of Purneah, dated the 29th November 1861, *affirming a decree of Moulvie Enamool Huq, Deputy Collector of Arrariah, dated the 29th January* 1861.

Sheikh Peer Bux (Plaintiff) *Appellant,*

versus

Mowzah Ally (Defendant) *Respondent.*

Moonshee Ameer Ally and *Moulvie Aftaboodddeen Mahomed* for Appellant.

Baboo Kallykisto Sein for Respondent.

The receipt of rent for 1268 by the landlord bars his right to eject the tenant for non-payment of rent, due up to the end of 1267; the receipt for rent being an affirming of tenancy for that period. The receipt of rent for 1268 has the same effect, as if the landlord had, at the commencement of 1268, created a new tenancy.

In this case the plaintiff sought to recover arrears of rent due up to the end of the Bengalee year 1267, and also to eject the tenant from possession on account of non-payment of the said arrears. The suit was brought under the provision of Section 78 Act X of 1859, and the claim to eject the tenant was founded on Section 21 of the said Act. The Deputy Collector gave judgment in favor of the plaintiff for the arrears, but refused to order the ejectment of the defendant, upon the ground that the plaintiff had distrained for, and received rent for the year 1268. The Judge affirmed the decision of the Deputy Collector, and from that decision of the Judge the plaintiff has appealed.

The question for decision is, did the receipt by the plaintiff of rent for 1268 bar his right to eject the tenant for the non-payment of the rent due up to the end of 1267? We are of opinion that it did.

The receipt of rent for 1268 affirmed the tenancy, and conclusively bound the plaintiff from contending that the defendant was a trespasser in 1268; whereas the suit for ejectment is founded on the ground that, by reason of non-payment of rent up to the end of 1267, the defendant's tenancy had expired, and that he was liable to be ejected. The receipt of the rent for 1268 had the same effect as if the plaintiff had, at the commencement of 1268, created a new tenancy. If he had done so, it is clear that defendant, for non-payment of rent for 1267, could not be liable to ejectment. So, if the plaintiff had obtained judgment in this suit to oust the defendant for the non-payment of rent for 1267, and had afterwards, instead of executing the judgment, allowed the defendant to continue in possession and to pay rent for 1268, it would have been a bar to his afterwards executing the judgment. If the plaintiff is entitled to judgment to eject the defendant, he is entitled to take possession of the land in the state in which it now is.

The tenant, relying on the fact of the tenancy which the plaintiff has, by the receipt of rent for 1268, admitted to exist during that year, may, at the end of 1268, have sown his crop for 1269; and if the plaintiff is now entitled to eject him, he would obtain the growing crops without being bound to make any compensation for them to the tenant.

According to the law of England, if a lease contain a proviso that, in the event of non-payment of rent, the lease shall be void, and the landlord may re-enter, the landlord cannot re-enter for the non-payment of rent for one year, if he received the rent for a subsequent year.

We think that, by receiving rent for 1268, the plaintiff has precluded himself from ejecting the defendant for the non-payment of rent due up to the end of 1267. We, therefore, concur with the lower Courts, and hold that this appeal must be dismissed with costs and interest on such costs at 12 per cent, from this date until the realization thereof.

The 30th July 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Estoppel (Decree in former suit)—Leases by Putneedars afterwards defaulting Cases.

Case No. 4 of 1862.

Regular Appeal from a decision of Roy Taruck-nauth Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th September 1861.

Oomanauth Roy Chowdhry and others (Plaintiffs) *Appellants,*

versus

Roghoonauth Mitter and others (Defendants) *Respondents.*

Baboos Jugdanund Mookerjee, Dwarkanauth Mitter, and *Kishen Kishore Ghose* for Appellants.

Baboo Shumboonauth Pundit for Respondents.

The plaintiff's former suit for rent upon a kubooleut, dated in 1258 having been dismissed, and the kubooleut pronounced spurious,—Held that he was not estopped from now suing to set aside a pottah of 1244 under which the same defendant claimed, the validity of the pottah not being in issue in the former suit.

Under Clause 2 Section 11 Regulation VIII of 1819, all leases originating with the late defaulting holder of a putnee talook, creating a middle interest between him and the actual cultivators, held to be cancelled on the sale of the talook.

Costs awarded as for Rs. 5000, as defendant by not objecting to the valuation of the suit forced the plaintiff to appeal to the High Court instead of the Zillah Court, an appeal lying to the latter within that amount.

Suit to cancel a pottah, and for confirmation of title, valued at Rupees 5,263-8-13-12.

The Principal Sudder Ameen of the 24-Pergunnahs dismissed the suit.

The plaintiff is the auction-purchaser of lot Kishra, a putnee talook subordinate to the wukt, or endowed mehal, of Mahomed Hossein. The defendant holds nine mudafut jummas subordinate to the aforesaid putnee talook. The defendant claims to hold these nine mudafut jummas at an aggregate fixed jumma of Rs. 346-11-5-8, as per lease (pottah) granted to him by the former proprietor of the superior putnee talook. The date of the lease is the 27th Aughran 1244, B. S. The plaintiff, as it appears, first sued the defendants for an alleged balance of rent on account of certain kists of the year, basing his claim upon a kubooleut, dated the 6th Srabun 1258, B. S. After some litigation this suit was eventually dismissed, and the kubooleut pronounced to be spurious.

The points for decision that arise in this appeal are:—

First.—Is the decision of the Judge in appeal, dismissing the plaintiff's claim for rent, conclusive as against the plaintiff?

Second.—Is the pottah filed by the defendants binding against the plaintiff, who is the auction purchaser of the superior putnee tenure, under the provisions of Regulation VIII of 1819?

On the first point, we find that the decision of the Judge is not conclusive as against the plaintiff. The issue in that suit was the *bona fides* or otherwise of the kubooleut propounded by the plaintiff. The claim was for rent, and was based on the counterpart deed of another lease. The Judge may have incidentally remarked upon the pottah which was filed by the defendants in the rent case; but such remarks were foreign to the point in issue in that case, and were consequently extra-judicial, and, as such, entitled to no weight.

On the second point, the Court are of opinion that the plaintiff is entitled to a decree setting aside the pottah of the defendant.

Under the provisions of Clause 2 Section 11 Regulation VIII of 1819, all leases originating with the late defaulting holder of a putnee talook, creating a middle interest between him and the actual cultivators, must be considered to be cancelled on the sale of the talook.

The defendant has been unable to show us that the party from whom he derived his pottah was vested with any special authority to grant leases upon a fixed jumma.

The Court, therefore, in reversal of the judgment of the lower Court, set aside the lease of the defendant. The plaintiff is at liberty to take such further steps for the enhancement of the rents hitherto paid by the defendant, or for his ejectment, as he may be advised to do.

In the matter of costs, the Court find that this suit was valued on the following principle:—It was estimated that the defendant was in possession of 396 beegahs, odd cottahs, which were valued at Rs. 12 per beegah, equal to Rs. 4,752-12-16; to which sum was added a demand for the rent of one year as per jumma assumed by the plaintiff, or Rs. 910-11-17-12,—grand total, Rs. 5,263-8-13-12.

The defendant, in the lower Court, did not urge that the suit was overvalued to such an extent as to affect the venue of the Appellate Court. Far from this, we find that he took exception to the area quoted by the plaintiff, as being less than what was in his occupation. We therefore award costs upon a valuation of Rs. 5,000; as the defendant, by not objecting to the valuation of the suit, has forced the plaintiff to appeal to this Court, instead of to the Zillah Court. The above valuation-sum of Rs. 5,000, upon which the costs are to be calculated, is assumed by us, inasmuch as it is the limit within which an appeal to the Zillah Court would lie. The costs in this case will bear interest, at the rate of 12 per cent. per annum, from this date to date of realization.

The 30th July 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Limitation—Revival of suits and Appeals—Special Appeal.

Case No. 13 of 1862.

Special Appeal from a decision of Mr. G. C. Fletcher, Judge of West Burdwan, dated the 20th April 1861, reversing a decree of Mr. Drummond, Officiating Collector of that district, dated the 25th May 1860.

Bungsheedhur Mundul (Plaintiff) *Appellant*,

versus

Puddo Lochun Roy Sirdar Ghatwal and others (Defendants) *Respondents*.

Baboo Bhoobun Mohun Roy for Appellant.

Baboo Jugdanund Mookerjee for Respondents.

Section 2 Act LIII of 1860 refers to appeals *and* to suits; and as the suit of the special appellant, which had been decreed in the Court of first instance, was dismissed by the lower Appellate Court, the special appellant was held entitled to a revival of his suit.

Section 378 Act VIII of 1859 refers to applications for review of judgment, but this not on applications for revival of suit under Section 2 Act LIII of 1860. A special appeal does lie in the latter case.

This was a suit to recover possession of twenty-four beegahs, five cottahs, and ten and half gundahs of land, and a tank.

The Officiating Collector of Bancoorah gave the plaintiff a decree. On appeal by the defendants, the Zillah Judge decreed the appeal, and dismissed the suit, holding that the suit was barred under Section 30 Act X of 1859, inasmuch as it had not been instituted within the period of one year from the date of the accruing of the cause of action.

The plaintiff (special appellant) then applied to the Zillah Judge for a revival of the suit under

the provisions of Act LIII of 1860, which law was passed subsequent to the decision of the Judge dismissing the suit under the provisions of Section 30 Act X of 1859.

The Judge, in the first instance, admitted the application to revive the suit; but on the 20th of April 1861, when the case came on for hearing, he recorded the following order:—"Whereas the order passed for the revival of this suit was erroneous, inasmuch as no appeal can be revived under Section 2 Act LIII of 1860, except an appeal which has been dismissed or rejected, and this appeal, No. 26, had neither been dismissed nor rejected, I cannot grant the desired revival."*

The Court are of opinion that the decision of the Zillah Court is manifestly wrong. The cause of action accrued before the enactment of Act X of 1859, or before the 1st August 1859. The decision of the Judge, dismissing the plaintiff's claim and decreeing the defendant's appeal under the provisions of Section 30 of the aforesaid Act, was passed before Act LIII of 1860, which amends Act X of 1859, became law.

The provision found in Section 1 Act LIII, is to be read as part of Section 30 of Act X, and is to the effect that if, in any suit to which Section 30 is applicable, the cause of action shall have accrued before the first day of August 1859, such suit shall be instituted within two years from that day, or reckoning from the passing of Act LIII, *i. e.* the 26th December 1860, within a period equal to the period of limitation for the institution that remained unexpired at the date of the passing of Act X of 1859, provided that no such period shall extend beyond the 31st July 1861. Now, we find that the cause of action, that is to say, the date of ouster, accrued on the 14th Aughran 1265 B. S., corresponding with the 27th November 1858. The suit was brought on the 3rd of May 1860, or within less than two years from the 1st of August 1859, as provided in Section 1 Act LIII of 1860. The suit is, therefore, clearly within time.

The Court further hold that the Zillah Judge has misapplied the provisions of Section 2 of Act LIII of 1860. That Section enacts that any suit or appeal, which may have been dismissed or rejected on the ground that the suit had not been commenced within the period prescribed in Section 30 of Act X of 1859, may be revived. This Section clearly refers to suits as well as to appeals; and as the suit of the special appellant, which had been decreed in the Court of first instance, was dismissed by the lower Appellate Court, the special appellant is clearly entitled to a revival of his suit.

The pleader for the special respondent argued that no special appeal will lie to this Court, and he quoted Section 378 Act VIII of 1859 in support of his argument. It is true that this Section enacts that any order passed on an application for review of judgment, and which may reject such application, is final; but the application in this case was for the revival of a suit under the provisions of a later law, and not for a review. The object of the petition for the revival of the suit was to enable the Judge to apply the provisions of Act LIII of 1860, which had been enacted subsequent to the passing of the Judge's decision dismissing the plaintiff's suit as barred under the provisions of Section 30 Act X of 1859.

We therefore reverse the decision of the Judge, and remand this suit for a decision upon the merits.

* In the original it is written "I grant the desired revival," but this is a mere clerical error, and this was admitted by both parties.

The 30th July 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Awards (under Act XIII of 1848)—Decision of Collector under the Butwarra law.

Case No. 4 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. F. Sandys, Judge of Bhaugulpore, dated the 26th November 1860, reversing a decree of Mr. G. P. Worgan, Officiating Deputy Collector of that District, dated the 15th September 1860.

Pultoo Roy and others (Defendants) *Appellants*,

versus

Greedharee Singh (Plaintiff) *Respondent.*

Baboo Tarucknauth Sein for Appellant.

Baboos Shumboonauth Pundit and *Dwarkanauth Mitter* for Respondent.

The decision of a Collector under the Butwarra law is not an award within the meaning of Act XIII of 1848.

In this case the defendant in the lower Court is the appellant. The suit was brought, under Clause 1 Section 23 of Act X of 1859, for delivery of a kubooleut at Re. 1-8 per beegah. The defence was, that defendant had always paid rent at 4 annas a beegah under a mokurruree pottah.

In 1858 a final decision was passed under the butwarrah law, by which the zemindaree, of which the plaintiff's estate formed a part, was divided.

In the papers of the Ameen, and on division of the rents amongst the co-sharers in the estate under the butwarrah, the rent payable by defendant for his land was stated to be Re. 1-8 per beegah. The defendant objected, and his objection was rejected by Mr. Tucker, the Collector, on the 3rd March 1859.

The lower Court dismissed the plaintiff's suit, on the ground that the defendant had all along been paying rent at the rate of 4 annas. On appeal against that decision, the Judge did not go into the evidence, but reversed the decision of the lower Court and decreed in favor of the plaintiff, upon the ground that the decision of the Collector, on the 3rd of March 1857, was binding, no suit having been brought by the defendant within 3 years to contest it.

Against that decree the defendant has appealed; and the question for determination is, whether the decision of the Collector was an award within the meaning of Act XIII of 1848.

It is clear that it was not. The defendant was no party to the butwarrah, and was not bound by any statement of the Ameen as to the amount of rent payable by him. That statement was made simply for the purpose of ascertaining the value of the shares to be allotted to each of the co-sharers under the butwarrah. Act XIII of 1848 applies only to awards made by the Revenue Authorities under Regulations VII of 1822, IX of 1825, and IX of 1833. The statement of the Ameen or the decision of the Collector was clearly not an award under either of those Regulations.

The appeal, therefore, must be decreed, and the case is remanded for decision upon the merits.

The 30th July 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B., Kemp, *Judges.*

Rent—Instalment—Interest—Waiver.

Case No. 20 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. L. S. Jackson, Judge of Nuddea, dated the 3rd October 1861, *modifying a decree of Mr. A. M. Macgregor, Assistant Collector of that District, dated the 27th May* 1861.

Ruttykant Bose (Plaintiff) *Appellant,*

versus

Gungadhur Biswas and another (Defendants) *Respondents.*

Baboo Sreenath Doss for Appellant.

Roy Sreenath Sein for Respondents.

Both parties stipulated for payment of rent on certain dates, and (if not so paid) of a certain rate of interest until paid. The rent not having been paid on due dates,—Held that the landlord's omission to claim interest, instalment by instalment, for the fractional time that the rent was not paid when due, did not justify the plea that the interest stipulated for was not due, or warrant the belief that the plaintiff had waived his claim to interest.

This special appeal is on the point of interest claimed by the special appellant, but disallowed by the Judge.

Special appellant, plaintiff below, gave to special respondent a farm for five years, from 1259 to 1263. Defendant executed a kubooleut, or counterpart lease, agreeing to pay a yearly rent of Rs. 2,273 in certain instalments, and to pay interest at 1 per cent. per mensem in case of default in the payment of rent for any one instalment. The plaintiff pleaded that the rents had not been paid as agreed, and therefore claimed interest according to the terms of the lease. The defendant pleaded payment of rent on due dates.

The Assistant Collector, in the Court of first instance, gave plaintiff a decree for the arrears of rent claimed, with the interest sued for.

The defendant appealed to the Judge. The Judge held that "all the precedents, from that of Neelkant Banerjee (S. D. A. Decisions of 1852, page 508) downward, rule distinctly that interest is not to be allowed, in cases of rent, in the absence of a written stipulation, except after a regular demand, and generally from the date of a summary suit; but that, where there is a contract to pay interest, that contract must be enforced." And he proceeds to state that no claim for interest, especially for interest upon payments long since made and accepted, has been allowed by any precedent; and that it is inequitable that, after receiving payments a day, or a week, or a month, after the several instalments became due, the landlord should then claim interest for back years for each fractional period of time for which the rent was not paid on the exact date of the instalment being due. Further, that such conduct on the part of a landlord, *i. e.* the acceptance of rent without intimation of an intention to claim interest, entitled the tenant to believe that the interest for by-gone payments have been forgiven, and "lulled him into a false security, and, as it were, encouraged him to unpunctuality."

The Judge, therefore, disallowed the claim to interest, decreeing the rest of the plaintiff's claim to the principal of arrears of rent.

Plaintiff has appealed specially from this decision, and urged that the stipulations in the counterpart lease given by defendant, are clearly to the effect that, if the rent is not paid on a cer. date, interest will accrue upon the rent left unpaid from such date until the rent be paid

The special respondent's pleader argu support of the Judge's decision.

We are of opinion that, in this case, the sion of the Court below is erroneous, and sho be reversed.

The fact is admitted that it was stipulated between the parties that certain rent should be paid on certain dates; and that, if they were not so paid, interest at 1 per cent. per mensem should be charged till they were paid. The fact is found that the rents were not paid on due dates. The circumstance that the landlord did not claim interest, instalment by instalment, for the fractional time that the rent was not paid when due, does not justify the plea that such interest, so stipulated for, is not due. Nor does it warrant the opinion of the Judge that defendant should be exempted from interest on the ground that, by the plaintiff not claiming his interest, the defendant was lulled into false security, or, in other words, supposed plaintiff to have waived his claim to interest.

But, even if it be assumed that the Judge's reasoning on this point is correct, still the fact of this case will not allow of its being applicable here, because the plea of waiver was not raised by the defendant, but the plea of payments on dates. If the defendant had intended to rely on

the plea of waiver, he should have expressly raised that plea; although we do not say that, even if he had, we should have assumed, as the Judge has, that there was a waiver. But, as before remarked, this plea of waiver was not pleaded, and therefore the case cannot be decided upon it. It is found as a fact below that payments were not made on due dates, as defendant pleaded they were; and thus we consider plaintiff entitled to interest according to the stipulation of the case.

We therefore reverse the decision of the Judge, so far as relates to the point of waiver; and decree the appeal with costs, with 12 per cent. interest on the costs, till paid.

The 31st July 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Mortgage—Payment into Court (during foreclosure proceedings).

Case No. 26 of 1859.

Regular Appeal from a decision of Baboo Kashishur Mitter, Principal Sudder Ameen of Hooghly, dated the 25th June 1859.

Goluckmonee Dabea and others (Defendants) *Appellants,*

versus

Nubungo Moonjuree Dabea (Plaintiff) and others (Defendants) *Respondents.*

R. T. Allan and *Baboos Shumboonauth ndit* and *Kally Prosunno Dutt* for Appellts.

oo Kishen Kishore Ghose for Respondents.

Suit laid at Co.'s Rupees 10,130-6-3.

deposit made in Court during foreclosure proceedgs, by a mortgagor, in respect of his mortgage debt, few days before expiry of the year of grace, accompanied by a petition praying that the money so deposited might be kept pending an enquiry into certain objections made by him relative to the amount due under the mortgage,—HELD to be not a legal tender.

THE defendants owned a separate 5-annas share in the estate or lot Mullickapore, in pergunnah Balagurree, zillah Hooghly. They borrowed from the plaintiff, Nubungo Moonjuree's husband, Khettropal Roy, deceased, a sum of Rs. 3,100 on a mortgage (khut kubala) of the mouzahs and parts of mouzahs comprised in that share. This occurred in Pous 1255, and the principal and interest were payable in Cheyt 1258, or the sale was to become absolute. Payment in full not having been made on the due date, the mortgagee proceeded to foreclose, and procured issue of the regular notice. A few days before the year of grace expired, the mortgagors made a deposit in the Judge's Court of the balance due, accompanied by a petition, in which, reciting the fact of mortgage, and alleging that, by friendly intervention, an arrangement had been made with the mortgagees for the gradual liquidation of the amount due by instalments, also that Rs. 5,000 had been raised from other parties and paid to the mortgagees, it was prayed that the money might be kept under attachment until the truth of their objections could be enquired into.

These objections were, it seems, verbally withdrawn some months later, when, however, the year allowed by law had expired; and the money remains to this day in deposit.

Under these circumstances, the mortgagee's widow sued for possession of the estate.

Defendants pleaded this payment into Court; but the Principal Sudder Ameen held, with reference to the decided cases, that the deposit was not a tender within the meaning of the law, and gave the plaintiff a decree, against which the defendants appeal.

Mr. Allan, for the defendants, cannot dispute the relevancy of the precedents* referred to, to the present cases, which, in fact, precisely resembles the first of these cases; the depositor having, in the one case, prayed that the money might be kept under attachment, and, in the other, that it might not be paid to the mortgagee. The precedent of 1848 goes even further, for it declares the deposit, coupled with an intimation that the depositor would immediately sue for its recovery, and followed by the suit, to have been no legal tender.

Mr. Allan, however, adverting to the opinion of the dissenting Judge (Mr. C. Tucker) in the earlier case, wishes to contend that the doctrine there laid down is inequitable, and he refers to the English law of mortgage.

But we are clearly of opinion that the Court's ruling in the case of 1847 was entirely in accordance with the Regulation law. Its correctness has never been questioned, and we do not think ourselves at liberty, on supposed considerations of equity, to override a plain and very well-known provision of the law of mortgage in Bengal.† And we therefore dismiss the appeal, with costs.

The 5th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Suit for rent—Intervenor.

Case No. 60 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. R. Abercrombie, Judge of Dacca, dated the 19*th November* 1861, *reversing a decree of Mr. J. C. Dodgson, Collector of that District, dated the* 26*th July* 1861.

Mirzah Zahid Ally (Plaintiff) *Appellant,*

versus

Mirzah Hingun (Defendant) *Respondent.*

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* S. D. A., 1847, p. 462.
S. D. A., 1848, p. 897.

† *See* Macpherson's Mofussil Mortgages, p.p. 205-6, and S. D. A. 1859, p. 852.

Baboo Kally Kishen Sein for Appellant.

None for Respondent.

In a suit for rent, where the defendant pleads payment of rent to a third party as rightful heir and as in possession, and the third party intervenes and pleads to the same effect,—HELD that, according to Section 77 Act X of 1859, the question of the actual receipt and enjoyment of the rent by the third party should alone be enquired into, and the suit decided according to the result of such enquiry.

IN this case Meer Zahid Ally was plaintiff. He sued Ramgobind as his defaulting tenant, and alleged that his (plaintiff's) rights as landlord were acquired by inheritance from his wife, Sukheena Begum, and that he held possession.

Defendant Ramgobind pleaded that the proprietor of the mehal was one Mirzah Hingun, who had succeeded Sukheena Begum in that position; and that the defendant had formerly paid his rents to Sukheena Begum, and now did so to Mirzah Hingun as her heir and in possession.

Mirzah Hingun came in as the third party, and pleaded that he had succeeded to Beebee Sukheena as her heir, and duly received rent from Ramgobind, defendant.

The Collector, in the Court of first instance, held that plaintiff had proved his possession, and was, therefore, entitled to the rents for which he sued.

The third party appealed to the Judge and claimed the rents as the proprietor by right of inheritance, *i. e.*, as brother to Sukheena Begum, and as in possession as found by the Court of first instance.

The Judge, upon this appeal, fixed as the issue for trial in the case—"whether or no plaintiff had proved his claim." The Judge then held that plaintiff had not done so, as he had propounded a will which was not registered nor proved, and of which no probate had been taken. The Judge added that the plaintiff had not given any evidence of his alleged right of inheritance, and had merely shown that he had once paid the Government revenue, which fact could not prove his title to the property.

From this decision the plaintiff appeals specially to this Court, urging that the Judge has entirely erred in deciding this case as a question of title and right; that the first Court had found plaintiff had previous possession; and that, upon such a finding, it was for the Judge in appeal to go only into the question of whether this finding was correct or not, and to decide the case accordingly under Section 77 Act X of 1859.

Now, in this case the plaintiff claimed rents from defendant, alleging both his right and possession. Defendant denied that plaintiff was in possession, but pleaded that he (defendant) paid his rents to the third party as rightful heir and as in possession. The third party himself also pleaded to the above effect. With such allegations shown by the pleadings, Section 77 Act X of 1859 was the law by which the Judge should have tried the case. That Section provides that "when, in any suit between a landholder and a ryot or under-tenant under this Act, the right to receive the rent of the land or tenure cultivated or held by the ryot or under-tenant is disputed, and such right is claimed by or on behalf of a third person on the ground that such third person or a person through whom he claims *has actually* and in good faith received and enjoyed such rent before and up to the time of the commencement of the suit, such third person shall be made a party to the suit, and the *question of the actual receipt and enjoyment of the rent by such third person shall be enquired into, and the suit shall be decided according to the result of such enquiry.*"

Here the Judge has not enquired into the actual receipt and enjoyment of rent; consequently, he has not decided according to the result of such enquiry, that is, he has not done as the law directs in such a case as this.

We therefore decree the appeal, and reverse the decision of the Judge, and remand the case, in order that it may be re-tried with reference to the above remarks.

The 5th August 1862.

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Suit for Kubooleut—Jurisdiction (of Collector)—Admission of partial tenancy.

Case No. 98 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. A. E. Russell, Judge of Moorshedabad, dated the 7th November 1861, affirming a decree of Mr. H. Kean, Assistant Collector of that District, dated the 3rd July 1862.

Gooroo Persad Roy and others (Defendants) *Appellants*,

versus

Juggobundoo Mozoomdar and others (Plaintiffs) Respondents.

Baboo Poorno Chunder Roy for Appellants.

Baboo Sreenath Doss for Respondents.

In a suit for a kubooleut, the defendant having, by giving a kubooleut for a portion of the land in suit, acknowledged himself to be the plaintiff's ryot as to that portion,—HELD that the *onus* was on the defendant to prove his special plea of his not being the plaintiff's ryot as to the rest of the land.

The Collector has jurisdiction under Act X of 1859 in such a case.

The Court will receive and adjudicate a point of jurisdiction though not taken below, because as acts done without jurisdiction are acts of no legal effect at all, and must be set aside.

PLAINTIFF in this case sued for a kubooleut which he alleged was his right, as defendant had occupied and cultivated the land for the rents of which plaintiffs now sued.

Defendant denied that he is liable to give such a kubooleut. He pleaded that the whole land was 54 beegahs held in coparceny by plaintiff and defendant; that of this, 19 beegahs were rent-free, 12 beegahs belonged to another property, 13

beegahs were miscalculated; and that the defendant had given a kubooleut for 10 beegahs, being half of the 20 beegahs remaining to complete the above 54 beegahs, *i. e.* remaining with fractions of a beegah omitted in the calculations.

The Assistant Collector gave plaintiff a decree, as he held that plaintiff had proved that defendant cultivated the lands, and defendant did not prove his special plea of a portion of the land being rent-free.

The Judge, in appeal, records his judgment in the following terms:— "The appellant has filed no proof in support of his objections before the lower Court, and I see no necessity to interfere with the order passed by the lower Court."

From this decision the defendant appeals specially, and urges—

1*st.*—That plaintiff ought to have proved that defendant held his lands as mal lands of plaintiff, and that they were not rent-free as pleaded by defendant.

2*nd.*—That the Judge should have specially decided whether the 12 beegahs 15 cottahs averred by defendant to belong to a property totally distinct from plaintiff's did belong to such property or not, and that the Judge has not done this.

3*rd.*—That the Collector had no jurisdiction to try a suit of the nature of that which these pleadings brought before the Court.

The last plea, it may be observed, was not taken below; but even then, if the Collector had patently acted without jurisdiction, the Court would now receive and adjudicate the point; as acts done without jurisdiction could be acts of no legal effect at all, and must be set aside.

We find, however, in this case, that the defendant admitted that, as to a certain portion of the land for the rent of which plaintiff sued, he (defendant) had given a kubooleut, or, in other words, had acknowledged that he was plaintiff's ryot. With this *primâ facie* evidence of the fact of defendant being plaintiff's ryot, the burden of proving the special plea raised by defendant, of his not being plaintiff's ryot for the rest of the land, was clearly upon the defendant; otherwise, indeed, every ryot might meet every rent case by a false plea of proprietary title. The Judge, however, has found, as a fact, that the defendant did not give any proof to support this special appeal; and with such a finding of fact this Court cannot interfere in special appeal. Thus, then, on the pleadings, the Collector was bound to enquire if defendant was plaintiff's ryot or not; and, on the proof before him, he found plaintiff landlord, suing a party who, as defendant, was shown to be really plaintiff's ryot. The Collector had, therefore, jurisdiction under Act X of 1859; and the special appellant's plea, that the Collector acted without jurisdiction, is untenable.

Under this state of facts, it is unnecessary, for the purposes of this appeal, to go into the other pleas which were disposed of as matter of evidence, because, in such matter, no special appeal lies. We therefore dismiss this appeal, with costs, and interest at 12 per cent. till the costs be paid.

The 5th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Appeal—Error not affecting decision.

Case No. 65 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. E. Lautour, Judge of the 24-Pergunnahs, dated the 16th November 1861, *reversing a decree of Moulvie Abdool Luteef Khan Bahadoor, Deputy Collector of that district, dated the 25th March* 1861.

Kureem Khan and others (Plaintiffs) *Appellants*

versus

Sheikh Muhfooz and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

The Court will not interfere with a decree proceeding on a mistake as to the applicability of a law, when such error does not affect the proper decision of the case.

In this case plaintiff, as a superior ryot, sued for the rents of 4 beegahs 3 cottahs of land as occupied by defendant as a ryot under plaintiff, and pleads a kubooleut, dated 2nd Cheyt 1248 B. S., purporting to have been given by defendants to plaintiff. Defendants pleaded that they did not execute any kubooleut to plaintiff, and that the land was their rent-free land as Birmuhtro. The zemindar supported plaintiff's case. The Court of first instance held the kubooleut proved; that the measurement papers by which defendant tried to show his land to be rent-free did not refer to the lands in suit; and that defendant failed to prove his pleas by evidence. The first Court, therefore, decreed plaintiff's suit.

On appeal by the defendant, the Judge recorded that "the real controversy is obviously between the zemindar and the lakherajdar under Section 77." The Judge then went into the evidence and discredited that to the kubooleut, and observed that there was no payment shown from its date, 1248, to 1265, and then a demand for arrears of 1265-66-67 was made. He added, the plaintiff had pleaded the receipt of Rs. 3 as paid in 1265 from defendants, but had not proved it.

The Judge, thus holding that plaintiff had not proved his alleged kubooleut from defendant, and the payment which plaintiff averred he had received from defendant, dismissed plaintiff's suit.

Plaintiff appeals specially, and urges that the Judge has wrongly decided this case as one between the zemindar and lakherajdar, and also has wrongly applied Section 77, which does not refer to a contention of that nature.

We are of opinion that, although the Judge has erroneously cited Section 77 as applicable to this suit, still he has done this only incidentally, and not in a manner that has affected the proper decision of the case.

He has also, it is true, called the suit a contest between the zemindar and rent-free holder; but it is quite clear, from the main facts of his judgment, that, in doing this, he only refers to what he conjectures may be the ulterior object of such a suit as this.

On the substantial questions raised by the plaintiff and defendant by their own respective pleadings, he has adjudicated fully. These questions were:—

1st.—Whether defendant gave plaintiff a kubooleut.

2nd.—Whether defendant had acknowledged plaintiff's possession and right to receive rent by a previous payment to plaintiff.

The Judge has found, as one fact, that no kubooleut was given by defendant to plaintiff; as another fact, that defendant had not made the alleged payment in 1265 to plaintiff.

Upon this finding of facts, the Judge held that plaintiff had not established his claim to rent, and dismissed it. We have to observe, in the first place, that with findings of fact the law does not allow this Court to interfere in special appeal.

The other point is, whether, by the fact that the Judge used the words before cited, *viz* "the real controversy is obviously between the zemindar and lakheraj dar under Section 77," the special appellant could have been misled or taken by surprise as to the character of his pleadings, or as to the conduct of the case in the lower Appellate Court.

We do not think that he could have been so, because he joined issue upon the alleged fact of the kubooleut and payment pleaded by the plaintiff; and the case was substantially decided, as it ought to have been, upon those points, after both parties had given the evidence they thought necessary to prove their respective pleas.

The 6th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Suit for damages—Injury to land by former proprietor—Embankment not an encumbrance under Section 26 Act I of 1845.

Case No. 35 of 1859.

Regular Appeal from a decision of Baboo Tarucknauth Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th July 1859.

The Collector of the 24-Pergunnahs (Defendant) *Appellant,*

versus

Joynarain Bose (Plaintiff) *Respondent.*

Baboo Shumboonauth Pundit for Appellant.

Mr. R. T. Allan and *Baboo Kissen Kishore Ghose* for Respondent.

Suit laid at Co's Rupees 8,351-1*a*-8*p*-3*g*.

An action for damages will not lie against a present proprietor for injury done to the land during the time of the former proprietor.

Embankments are not encumbrances liable to be extinguished under Section 26 Act I of 1845, which refers only to tenures and leases.

The plaintiff sues to recover what he terms damages, in the shape of rent, due to him on 80 beegahs 14 cottahs of land, taken by Government for the construction of embankments.

The plaintiff purchased the estate on which the said embankments are constructed, at a public sale on the 14th of Pous 1250, and, admitting that the land was taken by Government during the tenancy of the former proprietor, conceives himself entitled to receive the estate in the condition and with the rights and interests therein existing at the time of the Decennial Settlement.

The reply of the Collector, on the part of Government, is to the effect that the lands were taken by Government for beneficial purposes, and to keep out the salt-water by raising embankments; and it is urged that the lands must have been taken up at or about the period of the Perpetual Settlement, with the full acquiescence of the proprietor at the time. The plaintiff has obained a decree on the grounds mainly, that, in another suit dismissed by the same Principal Sudder Ameen, a decree has been granted by the Judge to whom the appeal in that case lay.

In appeal, on behalf of Government, it is now urged that the lands were taken by the leave and license of the original proprietor, and for the public benefit; that the auction-purchaser is barred by the implied consent of the previous zemindar, and can derive, by his purchase, no rights independent or distinct from that person; and that, for several years, the plaintiff has himself made no complaint regarding repairs, as they were made to the existing embankments from time to time.

We are clearly of opinion that the present action will not lie, considering it as a personal one for damages: the alleged injury was not committed during the proprietorship of the present plaintiff, and can form no ground of action to him. If wrong was done, which we by no means lay down, the right of action would have been with the original zemindar or his representative, and cannot be revived in the person of the new purchaser.

The argument that the embankment is an encumbrance, and ought to be extinguished under Section 26 of the Sale Law (Act I of 1845), appears to us untenable, it being clear that that Section refers to tenures and leases, and was never intended to apply to public works of this character.

Even if the embankment could be held to be an encumbrance, the remedy would be for the plaintiff to sue for its avoidance, which he has not done.

Whether the plaintiff might not be able to show cause why he should be entitled to some abatement of revenue, is another question, which we need not determine. The application, in such a case, would lie to the Government.

Thus, deeming this suit wholly groundless, we reverse the decision of the lower Court and decree the appeal, with all costs.

The 6th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Evidence (of separation in Hindoo family.)

Case No. 37 of 1859.

Regular Appeal from a decision of Mr. R. J. Richardson, Judge of Shahabad, dated the 30th June 1859.

Peary Loll (Plaintiff) *Appellant,*

versus

Bhawoot Koer and others (Defendants) *Respondents.*

Moulvie Murhumut Hossein and *Baboo Gobind Chunder Mookerjee* for Appellant.

Moonshee Ameer Ally and *Baboo Kishen Kishore Ghose* for Respondents.

Suit laid at Co.'s Rupees 1,573-15.

Deeds of sale and mortgage and mutations of names in the Collector's register as amongst members of a Hindoo family, are evidence of separation.

IN this case the plaintiff, Peary Loll, sued his deceased elder brother's widow, Musst. Bhawoot Koer, to recover the said brother's share of the family estate, which he maintained to have been undivided.

The widow's answer was that the brother had lived separately and had separate dealings for many years before the death of her husband; and that she, having a daughter living, had succeeded and was in the enjoyment of his estate, to which the plaintiff had no right.

The Mitakshara being admittedly the law by which the parties were governed, the main issue for trial, of course, was whether the family was joint or divided.

Upon this issue the Zillah Judge, with advertence to the evidence adduced on both sides, found for the defendant.

In appeal, it is contended before us that, in number and respectability, the witnesses for the plaintiff, as to the estate being joint, far outweighed those for the defendant to the same effect, and that the documents which the Judge considered to be conclusive on this point, in fact proved nothing at all.

But, upon reading such of the witnesses' depositions as the appellant's pleader desired us to peruse, we find them open to the remark that neither number nor respectability in witnesses will supply the place of exact and necessary knowledge of the facts to which they depose.

These witnesses, we observe, are ready to affirm generally the statement which the plaintiff calls them to support; but when they are questioned as to particular occurrences connected with the subject-matter, their knowledge and recollection entirely fail.

On the other hand, the documents produced by the widow, being deeds of sale and mortgage, mutations of names in the Collector's register as between the two brothers, are papers which the Court is bound to consider, and which the late Sudder Court has always considered as indicating that the members of a Hindoo family between whom they have been executed were, at the time, living, not in a joint undivided condition, but separately, each for himself.

We therefore affirm the decision of the lower Court, and dismiss the appeal, with costs.

The 6th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Land (illegally taken by Government for embankments)—Rent.

Case No. 404 of 1859.

Special Appeal from a decision of Mr. E. Lautour, Judge of the 24-Pergunnahs, dated the 8th July 1859, *reversing a decree of Baboo Taruckunauth Sein, Principal Sudder Ameen of that District, dated the 31st December* 1857.

The Collector of the 24-Pergunnahs (Defendant) *Appellant.*

versus

Joynarain Bose (Plaintiff) *Respondent.*

Baboo Shumboonauth Pundit for Appellant.

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Respondent.

The Government held liable for the rents of land not legally and formally taken possession of by its officers for embankments, during the time of its wrongful use and occupation.

THIS case has been reserved, in order that it might be heard together with a regular appeal relating to nearly the same subject, between the same parties—(for which see our decision of this day's date.)

The facts of this case, however, as found by the Judge, differ considerably from the facts in the regular appeal, and the difference is admitted by the parties.

The plaintiff sues for rent to the amount of 1,407-7-18-2, being principal and interest due on 70 beegahs of land, taken up for embankments by Government from 1258 to 1261, and since his purchase of the estate at auction.

The facts, as found on the admission of Government, are that the Officers of Government, in taking this land, did not act with reference to Regulation I of 1824, or under any legal formalities whatever.

Had the officials had recourse to the Regulation in question, then the plaintiff would have had his right to compensation in the shape of so many years' purchase of his rental, or in the shape of a remission of revenue, or of both.

As it is, the Government is in the possession of the lands simply as a trespasser, and it is no reply to this to urge that, if the plaintiff takes the embankment and its benefits, he must als-

be content to take the loss arising from the diminished area of the land.

Thus, in regard to the form which the action has taken, the plaintiff sues for the rents on the lands, which rents he might have collected had the lands not been illegally taken possession of for other purposes; and, as we are clear as to the absence of law on the part of Government, and as to the existence of a right of personal action on the part of the proprietor, we see no reason why that action should not assume the shape of a demand for his rents. The rents for lands wrongfully in the use and occupation of Government officers have been adjudged by the lower Court on legal evidence; and, deeming the plaintiff fully entitled to relief in this instance in the shape prayed for, we dismiss the special appeal, and affirm the Judge's decision, with costs.

The 9th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Suit to contest notice of enhancement—Local enquiry (The ordering a discretionary with Judge)—No special appeal.

Case No. 152 of 1862.

Special Appeal from a decision of Mr. E. Jackson, Judge of Midnapore, dated the 16th December 1861, modifying a decree of the Deputy Collector of Tumlook, dated the 21st August 1861.

Heeraloll Seal and others (Defendants) *Appellants*,

versus

Gungadhur Sunnaputty (Plaintiff) *Respondent.*

Baboo Kishen Kishore Ghose for Appellants.

Baboo Jugdanund Mookerjee for Respondent.

In a suit brought to contest a notice of enhancement, a Judge is not bound to order a local enquiry merely because he incidentally states such an enquiry to be the best source from which to obtain reliable evidence upon the point of rates.

Nor will a special appeal lie on the subject of the Judge exercising a discretion as to ordering or not ordering such an enquiry.

In this case the plaintiff had been served with a notice by defendant, to the effect that it was the intention of the latter to enhance plaintiff's rents. Plaintiff then sued to contest defendant's right to enhance. Defendant pleaded that he had issued the notice according to law, and that the rates which he demanded were fit and proper rates, with reference to those paid for lands of a similar quality in the neighbourhood.

The Court of first instance dismissed the plaintiff's case, holding that the rates demanded were proper rates, and that plaintiff had shown no good cause why he should be exempted from paying them.

The defendant appealed to the Judge, who held that the notice under which defendant sought to enhance did not mention the grounds upon which enhancement was demanded. This the Judge deemed "the most important fact, which the law imperatively required to be entered in the notice; and that its absence, in his opinion, rendered the notice totally invalid, and the enhancement, under such notice, illegal." The Judge, however, went on to state that, as the pleaders of both parties stated their wish that the case should not be decided upon this ground, but upon the merits, he proceeded so to decide that case. On the merits, the Judge held that it was proved, as a fact, that the plaintiff had resigned the jul (or rice) land, and therefore plaintiff was, as regards that land, in the position of a new ryot, and must pay whatever rent the zemindar demanded. In respect to the remainder, or kolaye (high) lands, the Judge held that plaintiff had proved that he had paid, for twenty years before, at the fixed rate which he pleaded he had. The Judge then referred to the evidence given on both sides upon this point, and concluded thus:—"This part of the case has not been well enquired into, but, looking to the evidence of both sides, I think that it preponderates in favor of the zemindar (defendant)."

The Judge next refers to the evidence as to the increased *productiveness* of the land, and, not deeming that evidence sufficiently clear to enable him to decide the matter, gives no opinion upon it. As to the question of whether plaintiff held a *larger area* than that for which rent had been paid, the Judge held that the case of plaintiff's holding a larger area was *not* made out. Then, as to the *rates*, the Judge's decision was that defendants must produce the clearest proof that the rate of plaintiff's holding was below the prevailing rates, and also that it appeared that special enquiry on the spot was necessary before any decision on such a point could be come to.

The Judge, in conclusion, makes certain remarks, which we give in his own words, as the defendant's appeal is based upon them:—"The defendant has, without any thought or care, issued an *illegal notice*, dealing only in generalities, on the ryot; and has attempted to support this notice by evidence which is as wanting in particulars as the notice. On such evidence, I cannot declare the ryot's holding liable to enhancement. I would recommend the zemindar to collect his evidence, both oral and documentary, first, and then to issue his notice of enhancement. Proceedings conducted as in this case must end in injustice." The Judge then dismissed plaintiff's case as to the jul or relinquished land, and in regard to which the Judge had held that plaintiff was in the position of a new ryot with no rights against enhancement; and he decreed plaintiff's case as to the kolaye or remaining lands.

It is against so much of the Judge's decree as is thus in favor of plaintiff that the defendant appeals; and he urges as his main grounds of appeal, that the Judge, after stating that he would decide the case,

not with reference to the supposed illegality of the notice, but upon the merits, has, in fact, decided it upon the illegality of the notice, as shown by the passage from his judgment cited in inverted commas. It is also urged that the Judge thought that the evidence was insufficient, and that the case could only be decided after a local enquiry; and yet did not order any such local enquiry.

Having heard the Counsel for the appellants, we are of opinion that there is no sufficient ground for allowing the special appeal in this case. Looking at the judgment as a whole, it is clear in the first place, that the Judge was of opinion that effectual illegality in the notice served by defendant was enough to justify a decree against him; but that, as the opposite party waived this objection and pressed for a decision upon the merits, he should proceed to give such a decision. He thereupon goes into the evidence, and holds it clearly proved that, for the jul or rice land, plaintiff was liable to have his rent enhanced; but that, for the kolaye land, defendant had not showed that he had any right to obtain a decree for the rates for which he had given notice. Then the Judge proceeds to say incidentally that, in all such cases, the best evidence on the point of rates is that which is to be acquired by enquiries on the spot. After which, reverting to the illegality of the defendant's notice, the Judge indicates that defendant should take care to make his notice legal, and also to get together better evidence on future occasions than he had on this. The Judge finally decrees against the defendant in respect to the kolaye lands, to that extent modifying the decision of the Court of first instance. In this judgment by the Judge, we cannot see that the Judge, as alleged by the appellants, has decided the case on a point upon which he had recorded that he would not decide it: nor do we think the Judge was bound to order a local enquiry because he incidentally stated such an enquiry as the best source from which to obtain reliable evidence upon the point of rates; nor, indeed, would a special appeal lie on the subject of a Judge exercising a discretion as to ordering or not ordering such enquiry. The Judge has, in short, in our view, decided this case upon the merits; and, thinking that the defendant had not made out all his case upon his evidence, dismissed that portion in regard to which this was his opinion.

On the whole, then, as we see no ground to decree this special appeal, we dismiss it, with costs, and interest at 12 per cent. upon those costs till they be paid.

The 12th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley, and F. B. Kemp, *Judges*.

Title—Evidence—Possession—Production of Conveyance—Statement of former owner.

Case No. 27 of 1862.

Regular Appeal from a decision of Mr. L. S. Jackson, Judge of Nuddea, dated the 25th November 1861.

Mr. George Clarke (Plaintiff) *Appellant,*

versus

Bindabun Chunder Sircar and others (Defendants) *Respondents.*

Baboo Jugdunund Mookerjee for Appellant.

Baboo Bunsheebuddun Mitter and *Romanauth Bose* for Respondents.

Suit laid at Co's Rupees 2,582-15.

Possession is evidence of title, and gives a good title as against a wrong doer; but a person who has not had possession cannot, without proof of title, turn an other out of possession, even though that other may have no title; for possession is a good title against every one who cannot prove a better.

The mere production of a conveyance is no evidence, that the person producing the document has obtained a conveyance from the person to whom the property was thereby conveyed; more especially when the person who produces the document is not, and never has been, in possession of the property.

A statement, relating to property made by a person when in possession of that property, may be evidence against himself, and all persons deriving the proper after the statement; but a statement made by a forn owner that he had conveyed to a particular person can not be evidence against third persons.

This suit was instituted in the Judge's Court at Nuddea, to recover possession of a piece of land and damages for pulling down a dwelling house which stood thereon.

The plaintiff was the manager of the Bengal Indigo Company. He alleged, in his plaint, that Mr. Harris, the former owner of factory Khalboolia, purchased the premises in question under a kubala, dated 7th Falgoon 1248; and that, subsequently, the managers of the Bengal Indigo Company, who purchased the said factory, enjoyed possession of the house in question by right the purchase of the Khalboolia concern; and that defendant, on the 10th Falgoon 1265, dispossessed them and had since pulled down the house.

The first issue framed for adjudication was—"It is true that the land and the dwelling-house were purchased by Mr. Harris, and that the rights and interests thereof were purchased by the Bengal Indigo Company from Mr. Harris. The conveyance to Mr. Harris was produced, but it does not appear to have been proved, and it was not old enough to be admitted in evidence without formal proof; but this case does not turn upon that point. No subsequent conveyance was produced; but, in order to prove his title, the plaintiff filed a petition said to have been presented to the Collector by the agent of Mrs. Harris under a general power of attorney, and a petition to the Principal Sudder Ameen by Messrs. Cockerell and Co, through their vakeel, the former acknowledging the transfer of the Khalboolia concern by Mrs. Harris to Messrs. Cockerell and Co., and the latter acknowledging the conveyance of the same concern by Messrs. Cockerell and Co. to the Bengal Indigo Company. The Judge was of opinio

that the petitions were not evidence of the transfers mentioned in them respectively; and he held that, even if they were admissible as evidence of the transfers, there was nothing to show that the house and land in question, which had been purchased by Mr. Harris under a separate coveyance, were ever merged in, or formed part of, the Khalboolia concern, or were alienated as part of the appurtenances of that concern; and he dismissed the plaintiff's suit.

From this decision the plaintiff has appealed, and it is contended, on his behalf, that as the title of Suda Sheeb, from whom Mr. Harris purchased, was not contested, and as the defendants declared that three-fifths were derived through him, the plaintiffs were entitled to recover. But it is clear that the *onus* lay upon the plaintiffs to prove their title. Not having been in possession, they could not recover against the defendants without proving title. Possession is evidence of title, and gives a good title as against a wrong-doer. But a person who has not had possession cannot, without proof of title, turn another out of possession, even though that other may have no title; for possession is a good title against every one who cannot prove a better. It was admitted by the plaintiff's vakeel, Jugdanund Mookerjee, that there was no evidence to prove that either Messrs. Cockerell and Co. or the Bengal Indigo Company ever had possession of the house and land in question; and he acted very properly in not wasting the time of the Court by reading the depositions of the witnesses when he found that their evidence proved nothing material for the decision of the case. He took every point that was available for his client. He contended that the fact of the plaintiff's producing the conveyance from Suda Sheeb to Mr. Harris was sufficient evidence that the plaintiff had derived title from Mr. Harris, inasmuch as it was always the practice for the seller to deliver his title-deeds to the purchaser. But it is clear that the mere production of a conveyance is no evidence that the person producing the documents has obtained a conveyance from the person to whom the property was thereby conveyed, more especially when the person who produces the document is not, and never has been, in possession of the property. Further, he contended that the petitions were evidence of the transfers thereby acknowledged. But they were clearly not evidence. They amounted to nothing more than statements. If Mrs. Harris had declared in the presence of a witness that she had conveyed to Messrs. Cockerell and Co., her declaration would not have been evidence against a third party. She could not have been indicted for perjury if her statement were false, and the defendants against whom her statement was offered had no opportunity of cross-examining her. If her statement would not have been evidence against the defendants, upon what principle can it be contended that a petition containing an acknowledgment by her agent was evidence against them? A statement relating to property, made by a person when in possession of that property may be evidence against himself and all persons deriving the property from him after the statement; but a statement made by a former owner that he had conveyed to a particular person, could not possibly be evidence against third persons. If it were so, A might sell and convey to B, and afterwards declare that he had sold and conveyed to C, and C might use the statement as evidence in a suit brought by him to turn B out of possession. If such evidence were admissible, no man's property would be safe. The petitions, therefore, were properly rejected. Further, it was urged in argument, on the part of the plaintiff, that possession had been delivered to Suda Sheeb under Act IV of 1840; but that did not carry the case farther, for it was not denied that the property had formerly belonged to Suda Sheeb, but it was not proved that Mr. Harris ever received possession from Suda Sheeb. Further, the plaintiff's vakeel produced two conveyances which were alleged to be conveyances from Mrs. Harris to Messrs. Cockerell and Co., and from them to the Bengal Indigo Company; but they were not proved. It was alleged that they could not be produced in the Court below, because they were in England at the time of the trial; but the plaintiff ought not to have gone to trial upon the issue raised without proof of those conveyances. It was said that he was mistaken in considering that the petitions would be admissible evidence, and therefore he went to trial without the deeds. If this were so, his proper course was to apply to the Court below for a review of judgment under Section 376 of Act VIII of 1859. It is clear that the plaintiff has no right to produce additional evidence in the Appellate Court for the purpose of reversing the decision of the lower Court. If, however, this Court had been satisfied that injustice would be done by not admitting the deeds in evidence, it would probably, under the circumstances, have adopted some course, either under Section 355 or otherwise, for the purpose of giving the plaintiff an opportunity of proving his title upon such terms as they might have considered reasonable. But they found that the deeds did not describe the house and land as part of the property intended to be conveyed, but merely conveyed the Khalboolea concern. If, therefore, the deeds had been produced and proved, the plaintiff would not have been forwarded, for there was no evidence to prove that either Mr. Harris or the plaintiffs had ever had possession of the house and land, or had ever used or treated them as part of the concern; and without such evidence they could not pass under the general description of the deeds. The Judge was right in stating that there was nothing whatever to show that the premises purchased by Mr. Harris in 1248, under a separate title, ever merged in the Khalboolea concern or were alienated as part of its appurtenances. There could be no benefit derived from determining whether the deeds now produced were executed or not; for, if they were executed, there is no evidence to show that the description of the property intended to be conveyed by them was sufficient to include the property in dispute. On the contrary, it has been expressly found by

the lower Court that a similar description on the petitions was not sufficient to include it. The appeal, therefore, must be dismissed, with costs, and interest thereon at 12 per cent. to the time of realization.

The 12th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Suit for Pottah—Accretions—Section 2 Act X of 1859—To whom rent payable.

Case No. 97 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. G. G. Morris, Officiating Judge of Dinagepore, dated the 19th November 1861, affirming a decree of Mr. J. M. Lowis, Collector of Muldah, dated the 18th February 1861.

Kishen Dhun Audhikaree (one of the Defendants) *Appellant,*

versus

Mr. J. D. Campbell (Plaintiff) and others (Defendants) *Respondents.*

Baboos Jugdanund Mookerjee and *Kishen Kishore Ghose for* Appellant.

Baboo Aushootosh Dhur for Respondents.

A jotedar under Government is not entitled to a pottah from the zemindar, in respect of an accretion by alluvion to a jote the rent of which is payable to Government.

In this case the plaintiff sued for a pottah of land gained by alluvion. It was found by the Court below that the land was an accretion to the petitioner's jote, and that he was in possession of it; and a pottah was awarded. Against this decision the defendants has appealed; and it is contended that the plaintiff is not entitled to a pottah from the defendant, inasmuch as the plaintiff is not his ryot, and does not pay rent to him. It appears that the plaintiff holds his jote under Government, and not under the defendant; and that he pays his rent to Government, and not to the defendant. Under these circumstances, he is not entitled to demand a pottah from the defendant, and if any question arise between the plaintiff and defendants as to the right to the accretion, it must be determined by the Civil Court. Section 2 Act X of 1859 enacts that every ryot shall be entitled to receive a pottah from the person to whom the rent of the land held or cultivated by him is payable. In this case the rent of the jote is payable to Government, and, as the accretion was to the jote, the plaintiff has no right to demand a pottah from the zemindar or his ijaradar. He is not a ryot of the zemindar or his ijaradar, nor is rent payable by him to the zemindar or his ijaradar for the accretion. The appeal must be decreed, with costs, and interest upon such costs, at 12 per cent., from this date to the time of realization.

The 12th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Special Appeals from a decision of Mr. E. Jackson, Judge of Midnapore, dated the 26th November 1861, reversing a decree of Mr. J. F. Hewith, Deputy Collector of Gurbetta, dated the 13th July 1861.

Enhancement of rent—Presumption of Occupancy from Permanent Settlement.

Case No. 91 of 1862 under Act X of 1859.

Rajah Munmohun Sing (Defendant) *Appellant,*

versus

Messrs. R. Watson and Co. (Plaintiffs) *Respondents.*

Baboos Unnoda Persad Banerjee and *Onoocool Chunder Mookerjee for Appellant.*

Mr. R. T. Allan for Respondents.

The presumption of occupancy from the Permanent Settlement, created by Section 4 Act X of 1859, is rebutted by the ryot relying upon a pottah granted after the Permanent Settlement.

Plaintiff sued for a three-anna instalment of enhanced rent, alleged to be due for the months of Bysakh and Jeyt 1268.

The defendant set up a pottah alleged to have been granted on the 2nd Maugh 1212, at the rent of Rs. 12 per annum, for clearing jungle; and alleged that he had been in possession more than 57 years at that rent. The answer contained no allegation that the land had been held at that rent from the time of the Permanent Settlement.

The Deputy Collector held that, if the pottah was genuine, the rent could not be enhanced, and if it was not genuine, the rent could not be enhanced, as the defendant had held at the rent of Rs. 12 a year for 20 years and there was no proof that the rent had been fixed subsequently to the Permanent Settlement. From that decision the plaintiffs appealed. The Judge, upon appeal, considered that the pottah was not a genuine one, and held that the payment of a uniform rent of Rs. 12 for 20 years was no answer to the claim to enhance, as the defendant had rested his defence upon the pottah alleged to have been granted in 1212.

From this decision the defendant has appealed. We think that the Judge was right. Section 4 Act X of 1859 makes the payment of rent for 20 years, without alteration of the amount, presumptive evidence that the land has been held at that rent from the time of the Permanent Settlement; and, unless the presumption is rebutted, the ryot is entitled, by Section 3, to a pottah at that rate, and his rent, consequently, cannot be enhanced.

But in this case the defendant did not rely upon the fact that the land had been held at a rate of rent which had not been changed from the time of the Permanent Settlement, but upon a

pottah alleged to have been granted in 1212, long after the Permanent Settlement. His own defence rebutted the presumption; and, although he failed upon the ground that the pottah was not a genuine one, he never alleged, in his answer, that the rent of Rs. 12 had been paid from the time of the Permanent Settlement, as he ought to have done if he intented to rely upon that defence.

Another point made by defendant was that the plaintiffs had sued for a three-anna instalment for 1269, and that that year did not commence until the ceremony of Poonnea was performed, and that as that ceremony was not performed in plaintiffs' zemindaree, the rent was not due. This was not a plea that a particular usage existed in the zemindaree, that no rent for the year should be paid until after the ceremony should be performed. But the mere fact of the non-performance of the ceremony was set up as a defence. The Judge held that that defence was frivolous, and we entirely agree with him. It was not, therefore, necessary for him, nor is it necessary for us, to remand the case for the purpose of trying whether the ceremony of Poonnea had been performed or not in the plaintiffs' zemindaree.

The appeal must be dismissed, with costs, and interest on such costs, from this date to the time of realization, at the rate of 12 per cent. per annum.

The 12th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Variation of case after rejection of documentary Evidence—Admission of one ryot as against another.

Case No. 176 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. E. Jackson, Judge of Midnapore, dated the 16th December 1861, reversing a decree of Moulvie Khyrut Hossein, Deputy Collector of that District, dated the 25th June 1861.

Nurrohurry Mohonto (Defendant) *Appellant*,

versus

Narainee Dossee (Plaintiff) *Respondent.*

Baboo Jugdanund Mookerjee for Appellant.

Baboo Unnoda Persad Banerjee for Respondent.

The plaintiff, having sued for rent upon a kubooleut and failed to prove it, is not entitled to a decree if he shows that the defendants had paid him rent for a number of years; the Court observing that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to the execution of such document is found against him, and there are good reasons for believing that the document is not genuine.

An admission by one ryot as to the rate at which he holds (though against his own interest) is not evidence to prove the rate at which another ryot holds.

In this case the plaintiff sued for rent, alleged to be due to him from the defendant under a kubooleut. The Deputy Collector decided in favor of the defendant, holding that the plaintiff had failed to prove the kubooleut, and considering it a forgery. Upon appeal, the Judge affirmed the decision of the Court below, and agreed with the Deputy Collector that the alleged kubooleut was a forgery. Subsequently, the Judge, upon the application of the plaintiff, granted a review; and, after receiving further evidence, found that the ryots had, for ten years, paid rent at the rate claimed by the plaintiff, and decreed in his favor. But he did not find that the kubooleut was proved: on the contrary, he says "putting out of all sight the kubooleut, the facts which are deposed to are a proof that, for a large number of years, the ryots did pay at the higher rate."

From this last decision the defendant has appealed, upon the ground that the plaintiff having sued upon a kubooleut and having failed to prove it, was not entitled to a decree in his favor. We are of opinion that plaintiff was not entitled to recover. It is a general rule that a plaintiff must prove his case as laid in his plaint or written statement. If there is a variance between his statement and his proofs arising from inadvertance or mistake, the Court may allow the issues to be amended; but that is entirely at the discretion of the Court; and we think that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case when an issue as to the execution of such document is found against him, and there are good grounds for believing that the document is a forgery. Cases have occurred in which parties have attempted to support even a good case by forgery or perjury. If they fail in such attempt, they are very justly punished, and are certainly not entitled to any indulgence from the Court. The plaintiff, having failed in proving his case as originally stated, is not entitled to succeed; and in this case there are no sufficient grounds for allowing an amendment.

The appeal must be decreed, with costs, and interests thereon, at 12 per cent., from this date to the time of realization.

We observe that the Judge, in his judgment in review, says that he considers the admission made by the ryots who deposed in certain suits as to the rates of rent at which they held good, not only against themselves, but against all their fellow-ryots. Their admissions were against their own interest, and were supported by their receipts. We refer to this merely to correct the mistake into which the Judge has fallen. An admission by one ryot as to the rate at which he holds can surely not be evidence, though against his own interest, to prove the rate at which another ryot holds. We do not determine the case upon this point, but our decision is founded on the other reasons above given.

The 12th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Plaint (Fraudulent omission in)—False verification by agent—High Court's power of superintendence and revision as to orders for a Criminal trial for perjury.

Case No. 1188 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. E. Lautour, Judge of the 24-Pergunnahs, dated the 28th March 1862, modifying that of Mr. R. T. Sevestre, Deputy Collector of that District, dated the 12th July 1861.

Tarapersad Roy Chowdhry (Plaintiff) *Appellant,*

versus

Gopal Doss Dutt and others (Defendants) *Respondents,*

Mr. R. T. Allan and *Baboo Banee Madub Banerjee*, for Appellant.

Baboo Dwarkanauth Mitter for Respondents.

A plaintiff is not necessarily guilty of fraud if he omits to state in his plaint that he had formerly sued for a portion of the rent now sued for, but had failed for want of evidence. Nor can he be punished for false verification under Section 37 Act X of 1859 in respect of a plaint verified by his agent. So much of the lower Court's judgment as declared the plaintiff guilty of fraud and deserving to be punished for false verification, and as amounted to an order in view to Criminal proceedings being taken against him, was cancelled in the exercise of the High Court's general powers of superintendence and revision.

In this case the plaintiff sued for arrears of rent from Pous 1265 to Cheyt 1267. The defendant pleaded that the plaintiff had already instituted a suit for the rent from Pous 1265 to Aughran 1266, and that that suit had been dismissed. The plea was proved; but the Deputy Collector, notwithstanding, gave judgment for the full amount. The defendant deposited the amount decreed against him and appealed to the Judge of the 24-Pergunnahs, who ordered that the amount, in respect of which the plaintiff had formerly sued, should be repaid to the defendant. In recording his judgment in the case, the Judge says:—"It is urged that the plaintiff ought to be punished under Section 36. He has fraudulently blended an old claim with a new one, so as to obtain a decree for monies which he failed to recover in his original action. Doubtless, he ought to be punished for a false verification. The Deputy Collector will call upon the plaintiff for any defence he may have to make under the 36th Section of Act X of 1859, and pass such orders as may seem expedient." A copy of the judgment was, in pursuance of a memorandum made in pencil by the Judge at the foot of it, forwarded to the Deputy Collector, who sent the case up to the Magistrate.

The plaintiff has appealed upon, amongst others, the following grounds, *viz.* that the dismissal of his former suit for want of evidence is no bar to his suing for the same amount, and that he was entitled to renew his suit; that the Deputy Collector having decided the point in his favor, the Judge had no power to remand the case to the Court of first instance to make an enquiry into the matter of perjury; and that the plaint not having been verified by the plaintiff, but by his agent, the plaintiff is not guilty of perjury.

It is admitted that the decree is correct. It is likewise admitted that the former suit was dismissed for want of evidence, and that there was no finding in that suit that the rent was not due. There is certainly no such finding in the present suit. The plaint in the present suit merely stated that the defendant held the lands at such a rate, and that the rent, from Pous 1265 to Cheyt 1267, was in arrear and unpaid. There was no statement in the plaint shown to be false within the meaning of Section 36. The only thing is that it did not state that the plaintiff had formerly sued for a portion of the rent, but had failed for want of proof. The defendant did not appear in the former suit, and if the plaintiff had failed to appear and offer evidence, he might have brought a fresh suit under Act X of 1859, Sections 54 and 68. The plaintiff was not guilty of perjury even if he had verified the plaint; but, in fact, he did not verify it himself, but it was verified by his agent under Section 69. If all the facts stated by the Judge were proved, the plaintiff could not be convicted of perjury. We, therefore, think that the Judge was wrong in saying that the plaintiff deserved punishment for false verification. It is nowhere stated in Act X of 1859 that a decree against a plaintiff in a former suit shall be a bar to another suit for the same demand. It is merely upon general principles that it is a bar; and it is not because a man's agent may not be fully acquainted with the law, or may make a claim to which there may be some legal defence, that the principal is to be indicted for perjury. The difficulty is, that the statement made by the Judge in delivering judgment or in recording it is not in the decree; not is it part of the decree that the Deputy Collector should call upon the plaintiff for any defence he may have to a charge of false verification of a plaint, and pass such orders as might seem expedient. The decree being correct, we cannot reverse or modify it. The appeal must therefore, be dismissed.

We are, however, of opinion that that part of the judgment to which we have referred amounts to an *order*, and that that part of it which states that the plaintiff has fraudulently blended an old claim with a new one, so as to obtain a decree for money which he failed to recover in his original action, and doubtless deserves punishment for false verification, was in the nature of a recital in the order. The judgment was treated as an order, sent to the Deputy Collector, and acted upon by him as an order. Seeing that that order is wrong, we think that it is our duty, in the exercise of our general powers of superintendence and revision, to set it aside. It is injurious to the plaintiff's character to let it stand, and it may be worse than injurious to his character. The Deputy Collector has already sent the plaintiff to the Magistrate, probably acting upon the declaration of the Judge that the plaintiff deserves punishment for false verification. The Magistrate, acting upon the

same statement, may possibly commit him for trial; and should the Acting Sessions Judge hold the same opinion as his predecessor, he may convict and sentence him to punishment. This Court would, after all, have to reverse the sentence. We, therefore, order that so much of the Judge's judgment as amounts to an order, including his declaration that the plaintiff was guilty of fraud and deserves to be punished for false verification, be set aside and cancelled. We say "cancelled," because we think that the charge ought not to remain on the records of the Court. As the grounds of appeal impugned the decree, and the defendant was obliged to appear and support it, and has done so successfully, we think that the appeal must be dismissed, with costs and interest from this date to the time of realization. No costs as regards the setting aside of the order contained in the judgment.

The 14th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Embankment—Drainage—Damages.

Case No. 54 of 1859.

Regular Appeal from a decision of Mr. G. P. Leycester, Judge of Midnapore, dated the 7th September 1859.

Hameedoonnissa and others (Defendants) *Appellants,*

versus

Anundmoyee Dossee and others (Plaintiffs) and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Shumboonauth Pundit* for Appellants.

Baboos Kishen Kishore Ghose, Ramanauth Bose, Poorno Chunder Roy, Dwarkanauth Mitter, and *Ramgopal Ghose,* and *Moulvies Ahmed Ally, Aftabooddeen Mahomed,* and *Lutfur Ruhoman* for Respondents.

Suit laid at Co.'s Rupees 14,307-3-8.

A proprietor who, by erecting a bund in his own land, impedes the flow of surface drainage water from the higher land of another proprietor, is liable to pay damages on proof of actual substantial resulting loss.

This is an appeal from the decision of the Zillah Judge of Midnapore.

The plaintiffs are proprietors of an estate in pergunnah Cossiparah, containing Chuck Doorgapore and other mouzahs, to the west and south of which runs the river Cossye. They alleged that the surface drainage, from various places to the west and north, naturally unites in Chuck Doorgapore, and thence, if not impeded, passes off over the defendants' villages, Barburria and others, till it reaches the Hussunkhali khal, and thence is carried away to the river, lower down.

They complained that defendants had wrongfully erected a bank along the west boundary of their own estate, extending from the Rajnaghur embankment on the south to the Kakonkhana sluice on the north, whereby, the natural escape of the drainage being impeded, the plaintiffs' lands had been flooded, and the plaintiffs themselves endamaged.

The defendants denied any such natural drainage; averred that the bank complained of had existed for many years; and denied that plaintiffs had, through their act, sustained any damage.

On trial, the Zillah Judge found that the bank was entirely new, and had been erected, in 1258 by Ally Hossein, deceased husband of one of the defendants, and by Ramchurn Banerjee, another of the defendants.

He found, also, that the construction of the bank had caused the flooding of the plaintiffs' lands, and he awarded damages in accordance with the plaintiffs' estimate, which he saw no reason to distrust.

In appeal the following issues were raised:—

1*st.*—Was the embankment of recent erection, as alleged?

2*nd.*—If so, did it injure the plaintiffs' rights?

3*rd.*—Have the defendants made out any circumstances which justified them in raising the embankment?

4*th.*—Whether any—and, if any, what—actual damage had been suffered by the plaintiffs?

Upon the first issue, we are quite satisfied, not that the embankment was a wholly new one, but that it was built up and repaired in 1258, and the outlets, previously existing, then closed, so that it became impossible for the water to escape as formerly.

On the second point, there can be no doubt that this act was a wrong towards the plaintiffs. It is clearly shown that the lands to the east were lower than those of Doorgapore, and therefore subject to the necessary servitude of carrying off the surface-water* from the higher lands. The defendant, consequently, having erected a bund, though in his own land, which deprived the plaintiffs' land of that natural advantage, was liable to pay damages at their suit, when resulting loss was established.

This principle has been fully recognized in a case exactly resembling the present by the Sudder Dewanny Adawlut—(*See* Decisions, 1860, Part II, page 301†)—and it has our entire concurrence.

We may observe that, in cases of this description, it will be necessary to show—

1*st.*—The relative position of the lands from which the natural and necessary servitude arises.

2*nd.*—The defendant's act which has affected that right.

3*rd.*—Substantial damage following as the consequence of that act.

As to justification, it was urged upon us that a necessity for making this embankment had arisen from the bursting of the degbund, or embankment, along the high-water level of the Cossye, upon the plaintiffs' land, whereby, from a cause beyond the defendants' power to move, their lands became liable to inundation from the river.

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* See Addison on Wrongs, &c., p. p. 6 and 9.

† Muthoora Mohun Mytree, appellant.

But this plea, in our opinion, only makes the case worse against the defendants, for, if the lower lands be subject to the servitude of receiving and discharging the waters of springs that rise on the surface of, and of rain that falls on, the lands on a higher level, *a fortiori* they are liable to carry off the waters of a flood which has come down from a level higher still; whereas, in this case, the defendants have enclosed the plaintiffs' land between their own embankment and the river.

It does not even appear that the plaintiffs were at all chargeable with the failure of the degbund. That, it seems, was a public work, raised and superintended by officers of Government for the common benefit.

We are told that there was another escape for the waters, the Rusguchtolla sluice; but, independently of the fact that the sluice is shown to have been one rather for the admission of water in seasons of drought, and that waters on the lower level of Chuck Doorgapore could not make their way through that higher aperture, we remark that, even if it were otherwise, the existence of that or other openings would only affect the question as to the degree in which the plaintiffs were injured and the defendants were responsible.

The last issue is upon the matter of damages.

The Court below has awarded the plaintiffs a large sum, by way of damages, upon evidence which we cannot think very satisfactory.

In a case of this kind, where the act complained of has been done by the defendants on their own land, we must hold, with Addison,* that there is no trespass, and that proof of actual substantial damage is essential to the cause of action.

The appellants' pleader, indeed, argued that no damage had been done to the plaintiffs at all, but only to the ryots whose crops might have been destroyed or injured; and that the resulting injury to the landlord, by loss of rents, was too remote to be considered in such an action. But we cannot assent to this view, and we hold that the retention of surface-waters by the defendants' act for a prolonged time, upon the land cultivated by the plaintiffs' tenants, was undoubtedly a circumstance creating such direct injury and loss to the plaintiffs as to give them a cause of action.

The only question is, whether the evidence before us warranted the Court in giving any—and, if so, what—damages.

We certainly think that a local enquiry would have been proper, so as to ascertain more exactly the truth and the necessity of the remissions of rent alleged by the plaintiffs. We observe also that local enquiry was prayed for by the defendants, late in the day, indeed, yet before judgment. Flooding of the plaintiffs' village is clearly proved, followed by the rotting of the paddy crops; and, as the water remained upon the land so late as the month of Pous, it is probable that no cold-weather crops can have been grown upon the lands so situated.

* Wrongs and their Remedies, p. 9.

Looking at the area so inundated, and bearing in mind the fact that, five years having elapsed since the suit was brought, a local investigation is less likely to be useful now, we think that substantial justice will be done between the parties by the award of Rs. 5,000 damages and costs. The defendants will open and keep open the five outlets formerly existing in the bund unless, by an agreement with the plaintiff, some other equally effectual way of promoting the flow of surface-water can be arranged.

The lower Court will enforce the execution of this part of the decree within a month from the date of its receipt.

The 14th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Governor General's Agent South West Frontier—Judicial powers of, before Regulation XIII 1833—Civil Courts of Zillahs Ramghur and Jungle Mehals.

Case No. 55 of 1859.

Regular Appeal from a decision af Captain James Davidson, Sub-Assistant Commissioner of Chota Nagpore, dated the 25th August 1859.

Binode Koomaree (Plaintiff) *Appellant.*

versus

Purdhan Gopaul and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Roy Sreenauth Sein* for Appellant.

None for Respondents.

Suit laid at Co.'s Rupees 10,000.

Before Regulation XIII of 1833, the Agent of the Governor General in the South West Frontier had no judicial authority, and no party was prevented from obtaining his remedy in the ordinary Civil Courts of Zillahs Ramghur and Jungle Mehals for any injury sustained by him through an order passed by that Officer.

This suit is instituted by Musst. Binode Koomaree, daughter of the late Purdhan Gobind Sahee, against Purdhan Gopaul Sahee and Rajah Juggurnauth Sahee, the zemindar of Chota Nagpore, for possession of the jagheer of pergunnah Tamar, which was the property of her father.

Plaintiff alleges that the tenure of pergunnah Tamar, paying an annual rent of sicca Rs. 2,401 to the Maharajah-defendant, the zemindar, was the ancestral estate of the deceased Rajah Ram Sahee, who held and enjoyed possession of the same during his life-time; that, after his death, he was succeeded by his grandson, Purdhan Nurput Sahee, who again, on his death, was succeeded by his eldest son, Purdhan Kishen Churn, the youngest son receiving jagheers; that, on Kishen Churn's death, his son, Bulram Sahee, and, on Bulram's death, his son, Gobind Sahee, plaintiff's father, succeeded to the property; that Gobind Sahee died on the 29th of September 1831, corresponding with the 14th of Assin 1233, without male heirs, but leaving, as heirs, two

widows, Ranee Sheeb Koomaree and Soogbund Koomaree, and a daughter, the plaintiff, and two sons of the plaintiff, Baboos Gopaul Singh and Gobind Singh, him surviving; that plaintiff's mother, Ranee Sheeb Koomaree, succeeded, on the death of Gobind Sahee, to the property, and she being dissatisfied and on bad terms with plaintiff and Gopaul Sahee, and being partial to one Moneenauth Sahee, grandson of Radha Churn, brother of Nurput Sahee, placed him on the Guddee, receiving from him malikhana; that, in the meantime, the proprietor of the estate, the Maharajah-defendant, brought a suit, on the 22nd March 1838, to resume the jagheer of Tamar, on the ground that it was a service tenure, and that, as Gobind Sahee had deceased without leaving a male capable of performing the service, it was liable to resumption, but Gopaul Sahee, plaintiff's eldest son, instituted, on the 11th January 1841, a suit for possession of the property; that both suits were pending in the Court many years, and were remanded by the Sudder Court, in special appeal, on the 30th June 1850; that eventually, on the 19th April 1852, the Rajah's suit for resumption was dismissed, and Gopaul Sahee's claim was dismissed on the 1st August 1851, on the ground that he had no right to sue for possession during the life-time of the widow of Gobind Sahee, Ranee Sheeb Koomaree; that Ranee Sheeb Koomaree died on the 31st May 1852, or 19th Jeyt 1259, and Ranee Soogbund Koomaree, Gobind Sahee's second widow, died 23 years ago; that consequently, under the Hindoo law of inheritance, plaintiff, the daughter of Gobind Sahee, with two sons living, is his heir. She, therefore, sues for possession of his property now wrongfully in the possession of the defendant, Gopaul Sahee.

The defendant, Gopaul Sahee, son of Moneenauth Sahee, in his answer, pleads that, by the custom of the family, the heritable tenure descends to eldest sons and only to male heirs, first in the direct and then in collateral lines, and that wife and daughter never succeed.

He then proceeds to state that the right to succeed is with him; and that, moreover, plaintiff is barred from bringing the suit to reverse the order of the Agent, dated the 1st May 1833, passed with the consent of the Supreme Council; and, if not barred, she is out of Court under the Statute of Limitation.

The lower Court, in its judgment, observes that "the first question to be considered is the competency of this Court to entertain this suit. The plaintiff urges that, by the decision of the Deputy Commissioner, dated the 1st August 1851, in the case of Maharajah Juggurnauth Sahee and Moneenauth Sahee, and, after his decease, Gopaul Sahee, it is proved that permission was given by Government to contest the validity of the order of the Agent and Commissioner, dated the 1st May 1833, which plaintiff now sues to reverse. The defendant urges that, under the Government letter, No. 311, dated the 16th December 1852, this Court cannot question the defendant's rights, which were adjudicated on by Captain Wilkinson in his proceedings, dated the 1st May 1833, which established the defendant's right to succeed to the Tamar Raj and Estate, the proceedings having been approved by Government on the 3rd June 1833. After a careful consideration of the arguments of both parties, I am of opinion that this Court is, under the Government letter quoted, incompetent to entertain this suit." It appears, from the proceedings of Captain Wilkinson, Agent and Commissioner, dated the 1st May 1833, that that officer, in his political capacity, declared Moneenauth Sahee, father of the defendant Gopaul Sahee, the rightful heir of Gobind Sahee, and with the sanction of the Government, placed him on the Guddee and in possession of the Tamar Estate. In the Government letter cited by defendant it is written:—"A point has been raised by the Deputy Commissioner as to whether a decision, passed by the Agent under the special rules of 1834, can be called in question by the Civil Court of the Agency, on the ground of irrelevancy. His Lordship remarks that, by Section 4 of Regulation XIII of 1833, the administration of Civil Justice is absolutely vested in the Agent, and, by Section 5, it is competent to the Government to prescribe such rules as it may deem proper for the guidance of the Agent and all his subordinate officers, and to determine what powers shall be exercised by the Agent and his assistants respectively, as well as to what extent the decision of the Agent, in Civil Suits, shall be final. The ground taken by the Deputy Commissioner is, that, in the order of 1834, the Government has not declared that the decisions of the Agent should be final, but merely that they should not be appealable to the Sudder Court; but, as observed by the Commissioner, it could never have been intended that the decision of the Agent, though final as respects the Sudder Court, should not be final as respects Courts of subordinate jurisdiction to himself. In the opinion of the Government, it would be clearly contrary to the whole policy of 1833 to permit any act of the Agent to be called in question by any subordinate, in either a executive or a judicial capacity, and His Lordship, accordingly, directs that this view of the case may be acted upon." "The proceedings of Captain Wilkinson, dated the 1st May 1833," the Court proceeds to remark, "are not, strictly speaking, a decision passed by the Agent under the special rules of 1834, as the order was passed before those rules were framed. But, according to the spirit of the letter quoted, I consider this Court incompetent to call in question a decision passed by the Agent and Commissioner in 1833, and, therefore, I dismiss the plaintiff's claim, with full costs."

From the decision of the Court below, an appeal has now been preferred to this Court by the plaintiff. He urges before us that the letter of the Government, upon which the Deputy Commissioner relies, refers to matters which have arisen since the passing of Regulation XIII of 1833, and which were provided for under the special rules of 1834; that it can have no reference to the

proceedings of Captain Wilkinson, passed in 1833, previous to the passing of Regulation XIII of that year; that this the Deputy Commissioner seems to admit: nevertheless, acting under the spirit, though not under the letter, of those rules, he has declared that he has no jurisdiction, and thus denied to him that hearing in a Court of Justice to which he is entitled.

We think it clear that the provisions of Regulation XIII of 1833, passed in December of that year and the rules passed in the subsequent year 1834, with a view of carrying out that law, are quite beside the question in determining the force and effect to be given to a proceeding of the Agent of the Governor-General on the South-Western Frontiers, passed on a date anterior to the passing of that law. We, therefore, are of opinion that the lower Court, in referring either to the letter or to the spirit of the rules of 1834 in determining the question before the Court as to its jurisdiction to try this case, has erred. The point must be determined by a consideration of the powers which belonged to the Agent before the passing of Regulation XIII of 1833, when the proceeding of Captain Wilkinson was held.

By Section 2 Regulation XIII of 1833, the Courts of Dewanny Adawlut of zillahs Ramghur and Jungle mehals, within the former of which zillahs the present property is situated, were abolished; and certain special provisions for the administration of Civil and Criminal Justice were enacted by Sections 4, 5, and 6 of that law. Before the passing of that law, the ordinary Civil Courts exercised the ordinary powers belonging to those Courts for determining all questions of Civil rights regarding succession to property situated within their several jurisdictions; and so far was the head Executive Officer of the South-Western Frontiers from having any special jurisdiction in such matters, that we learn from the decision of a late Governor-General's Agent, passed in 1847, that the proceedings of Agents, passed before the enactment of 1833, were not judicial in their nature; that that officer had then no judicial authority; and that, consequently, notwithstanding an order passed by him, no party was prevented from obtaining his remedy for any injury sustained by him through such order in the ordinary Civil Courts. It would appear from a letter of the Governor of Bengal, dated the 6th May 1851, which is before us, that in the decision of Colonel Ousely, to which we have referred, he was acting without jurisdiction, he himself having no judicial power in the district in which this property is situated.

This may be so; but it leaves untouched, the authority of Colonel Ousely, the Agent, and the fact that Captain Wilkinson, his predecessor, had no judicial power in 1833. Such being the case, it is clear that the present decision of the Deputy Commissioner cannot stand, but the case must be remanded.

We therefore remit the record to the lower Court with instructions that it will draw up, in proper form, all the issues arising between the parties in suit; give them an opportunity of producing their evidence, both documentary and oral; and then, taking the case out of its turn on the file, pass whatever judgment seems to him to meet the justice of the case.

The 16th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Res judicata—Suit for Certificate of sale after dismissal of suit for confirmation of sale.

Case No. 64 of 1859.

Regular Appeal from a décision of Baboo Dwarkanauth Roy, Principal Sudder Ameen of Tipperah, dated the 1st September 1859.

Mr. G. Lamb and others (Plaintiffs) *Appellants,*

versus

Dewan Puddum Lochun and others (Defendants) *Respondents.*

Baboo Kishen Kishore Ghose for Appellants.

Baboos Shumboonauth Pundit, Dwarkanauth Mitter, and *Hurrokally Ghose* for Respondents.

Suit laid at Co.'s Rupees 55,128-15a.-11g.-2*k*.

The plaintiff was a purchaser at a sale in execution of a decree. His former suit to reverse the order of a Judge annulling the sale, and for confirmation of the sale, &c.t, having been dismissed on the merits,—Held that he was precluded from maintaining his present suit for a bynamah or certificate of sale of the same property, the cause of action in both suits being identical.

This suit is instituted by Mr. George Lamb and others against Musst. Jussoda, the mother and guardian of her minor son, Peary Mohun Singh, and widow of Gopal Kishen Singh, deceased, and others. The claim is for possession, with mesne profits, of talook Kodeeram Roy by the reversal of the order of the Judge, dated the 21st September 1847, and the purchase made by Puddum Lochun and others at an auction-sale; and for a bynamah or confirmation of the order of the Principal Sudder Ameen, dated the 21st June, and the sale of the talook made by that officer on the 7th June 1847.

The defendant pleads a previous decision between the same parties, on the very point now at issue, passed by the Sudder Court on the 19th June 1856, as a bar to the present action; and we have simply to determine whether this plea, which has been determined by the Principal Sudder Ameen to be a valid one, is so or not.

It appears that, in execution of a decree obtained by one Toolsee Deen, the husband of the defendant, Jussoda Dabea, against Gopal Kishen Singh, she, after his death, brought to sale talook Kodeeram Roy on the 7th June 1847, when it was purchased by Mr. George Lamb in the name of Gooroo Churn Bysack, and the purchase-money was all paid in on the 21st June 1847. At the time of the sale an individual, named Lesalia Sookool, calling himself the mookhtear of the decree-holder, applied to the

Principal Sudder Ameen for the postponement of the sale. He was unable to produce an authority for making the application, so it was rejected. The judgment-debtor subsequently applied for the reversal of the sale, on the ground that the decree-holder requested the postponement of the sale, a request which should have been attended to. This application was rejected by the Principal Sudder Ameen on the 21st June 1847, but, on the 21st September 1847, the Judge, on summary appeal, reversed the order of the Principal Sudder Ameen, and annulled the sale.

Mrs. Lamb then sued for the reversal of the summary decision of the Judge reversing the sale; for the confirmation of the sale; and for possession of the talook with mesne profits. After having obtained a decree in the Courts below, her suit was dismissed, however, by this Court, on the 31st September 1851,* inasmuch as she, the wife of an European British subject, was incompetent, as a wife (for in such character she sued), to claim the property in suit in her own right.

Subsequently, a second suit was instituted by Mr. Lamb and his wife together, and, on the 1st May 1855, they obtained a decree in the lower Court; but, on the 19th June 1856,† in appeal, the Sudder Court reversed the judgment of the lower Court, holding that it was not competent to a purchaser at a sale, in execution of a decree, to institute a regular suit for the confirmation of a sale after its reversal on summary appeal.

A third suit has now been instituted by Mr Lamb, which is before us; and it is contended by the pleader, on behalf of the appellant, Mr. George Lamb, that the cause of action in it is not identical with that in the previous suit, inasmuch as that suit was brought for possession of the property sold with mesne profits, and this is for a bynamah or certificate of sale; and that, consequently, the point decided in that case cannot be identical with the point to be decided in this. But there is no foundation, in fact, for the assertion of the pleader. In both the suits the cause of action to the plaintiff was the summary order of the Judge, dated the 21st September 1847, reversing the sale of the talook Kodeeram Roy, which formed the bar to plaintiff's obtaining the property; and, in both plaints, the prayer distinctly is for reversing that order. Whether, after that order is reversed, the plaintiff asks for a certificate of sale or for possession, is immaterial. He is, on its reversal, entitled to both one and the other; and urging the charges on these two subordinate points cannot affect the main prayer of the two suits, which, as above remarked, is the removal of the bar to plaintiff's title, *viz.* the summary order of the Judge.

Such being the facts of the case, there can be no question that the legal point arising out of both the plaints, and now in issue, *viz.* whether the summary order for reversal of the sale can be set aside in a regular suit as between the parties before the Court, has been adjudicated on unfavorably to the plaintiff, and plaintiff's present suit, consequently, is inadmissible. We therefore affirm the judgment of the Court below, with costs.

* Decisions for 1851, p. 806.
† Decisions for 1856, p. 528.

The 19th August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt. *Chief Justice*, and the Hon'ble H. V. Bayley, and F. B. Kemp, *Judges.*

Jurisdiction (of Revenue Court)—Allegation and denial of relation of Landlord and Tenant.

Case No. 113 of 1862.

Special Appeal from a decision of Mr. C. S. Belli, Judge of Rajshahye, dated the 13th November 1861, reversing a decree of Baboo Mothooranauth Banerjee, Deputy Collector of that District, dated the 12th October 1860.

Hurree Persad Malee (Plaintiff) *Appellant,*

versus

Koonjo Behary Shaha and others (Defendants) *Respondents.*

Baboos Onoocool Chunder Mookerjee, Dwarkanauth Mitter, and *Kally Mohun Doss* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

If, in a suit brought in the Revenue Court on an allegation of the existence of the relation of landlord and tenant, that relation is denied by the defendant, the Court (instead of declining jurisdiction by reason of that denial) should judicially determine the fact, and take jurisdiction or not according to the result.

The plaintiff in this suit was a putneedar. He sued the zemindar, from whom he alleged he held his putnee, to recover possession of land, from which, he averred, he had been illegally ejected in Jeyt 1267. The plaintiff alleged his title to the putnee by a grant of it, in Kartick 1262, from the defendant's predecessor, one Joy Doorga Dossee.

Defendant denied that he had dispossessed plaintiff, and stated that he had purchased the right and interests of Joy Doorga in the zemindaree at a sale in execution of a decree of Court.

The Court of first instance, considering plaintiff's putnee proved, gave him a decree.

The Judge, on appeal by defendant, first states that there is the strongest reason for presuming the putnee-deed to be a collusion between plaintiff and Joy Doorga. He then records that this suit is one which was never intended to be instituted in the Revenue Court. The Judge proceeds on this point:—

"The issue involves an intricate question of title, to dispose of which numerous collateral points must arise;" and adds that the case in which the remedy for illegal ouster of a tenant by his landlord was left with the Revenue Court was something very different from the present case, *viz.*, cases in which there is no dispute as to title, but where, the landlord and tenant's right being admitted by both parties, the only question

to try is, whether the ejectment has taken place, and, if so, whether it is lawful.

The Judge then goes on into the merits, preferring, as he states, "proving the Deputy Collector wrong upon his own arguments to throwing the case out upon an interpretation of what he (the Judge) considered to have been the intention of the framers of the Act."

The Judge, having looked upon the putneedeed as collusive, then holds that another of the documents relied on by the Court of first instance, *viz.* the decision of the Principal Sudder Ameen of the 2nd May 1860, was one in which the Court did not give an opinion on the validity or otherwise of the putnee title.

As to the decision of the Deputy Collector of Rajshahye, dated the 20th August 1859, which was also a document relied on by the first Court as proof of plaintiff's putnee, in which case plaintiff, as putneedar, sued one Bhoyrub Chunder, as alleged farmer, the Judge held that the plaintiff's suit was dismissed, as the then intervenor, the present defendant, proved his title to the rent; and thus this decision furnished the strongest proof of the groundlessness of plaintiff's claim.

Thus, upon the merits of the case, the Judge dismissed plaintiff's case and reversed the order below.

The plaintiff, dissatisfied, appeals specially to this Court, urging :—

1*st.*—That the Judge is wrong in holding that the Collector is ousted of jurisdiction in a case of this kind; for, until the pleadings are gone into, and the truth or otherwise of the allegations in them tested by judicial investigation, the relation of the parties, whether it be that of landlord and tenant or not, cannot be ascertained.

2*nd.*—That, if the Judge hold the Deputy Collector had no jurisdiction, the Judge had no authority to go into the merits of the case, and reverse the decision below, which he held to be one without jurisdiction, and therefore, no decision at all, and, consequently, one not capable of being reversed on the merits: and

3*rd.*—That the Judge had wrongly decided the case as on the merits, having only just cursorily referred to the grounds taken by the Deputy Collector, and to them alone, and not having otherwise fully gone into the whole case.

Our opinion in this case is, that the Judge is wrong in holding that the Revenue Court had no jurisdiction in this case. The pleadings showed, on the one part, an allegation of the relation of landlord and tenant; and, on the other, a denial of that relation. Until the first Court had judicially determined the fact of the existence or non-existence of the relation of landlord and tenant, it could not determine whether it had jurisdiction or not.

If the case was, on judicial investigation, shown to be one between a landlord and tenant, the Revenue Court had jurisdiction and was bound to go on with the case; if not, then, and not before, the Revenue Court could say it had no jurisdiction. For this purpose, these allegations in the pleadings would not be enough, because allegations are nothing until they be proved; and to have them proved requires the Revenue Court to enquire and to decide. It may or it may not involve the solution of complicated questions in order to ascertain whether the relation of landlord and tenant exists or not; but the law does not say that, therefore, such questions will not be gone into by the Revenue Courts. If this were the case, the jurisdiction of the Revenue Courts would be in the hands of the parties, not of the Court; for, in this view, it would depend on the fact of the ryot alleging any other title or not, however falsely, whether the Revenue Court could exercise jurisdiction; and every case might be excluded from these Courts if each ryot were to make groundless allegations of the non-existence of the relation of landlord and tenant.

We therefore think the Revenue Courts are bound to ascertain, on judicial investigation, if the position of landlord and tenant is proved to exist or not, and to take jurisdiction or not according to the result; and that the Judge was wrong in his view on this point.

On the other points, we think there is a sufficient finding of fact by the Judge. He has taken up each of the documents mainly relied on by the Court below as evidence in plaintiff's case; and, on that evidence, differs from the Court below; and finds as a fact otherwise than that Court, *i. e.* that those documents do not prove plaintiff's case. The law does not allow us, on special appeal, to interfere with such a finding.

While, therefore, we think the Judge wrong in his view on the point of the jurisdiction of the Revenue Courts, we think his finding of fact one not to be set aside by this appeal.

We consequently uphold his judgment and reject the appeal, with costs and interest at twelve per cent. on them until they be paid.

The 21st August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley, and F. B. Kemp, *Judges*.

Rent—Payments made to superior proprietor without notice of intermediate lease.

Case No. 71 of 1862.

Special Appeal from a decision of Mr. T. C. Trotter, Judge of Behar, dated the 8th November 1861, *reversing a decision of Moonshee Lutchmun Persad, Deputy Collector of Behar, dated the* 13*th June* 1861.

Sheikh Attapyee Mowlah (Plaintiff) *Appellant.*

versus

Sheikh Sukhawut Ally and others (Defendants) *Respondents.*

Moonshee Ameer Ally for Appellant.

Moulvie Murhumut Hossein and *Baboo Shumboonauth Pundit* for Respondents.

A lessee, who has paid rent to the superior proprietor in ignorance and without notice of creation of the plaintiff's intermediate holding, is not liable to the plaintiff for the same rent.

THIS was a claim for rent alleged to be due on account of the kists (instalments) of rent for the month of Aughran and Pous of 1268 Fuslee.

The plaintiff averred that he was the mokurrureedar under a pottah granted to him by the superior maliks (proprietors) dated 11th Kartick 1268 Fuslee, and that the defendants were ticcadars, or lessees subordinate to him.

The amount claimed was—

Principal	Rs.	175-0-0.
Interest.................	„	4-0-0.
Total...	Rs.	179-0-0.

The Court of first instance, a Moonsiff invested with the powers of a Deputy Collector under the provisions of Act X of 1859, gave the plaintiff a decree. The Moonsiff held that the payments alleged to have been made by the defendants to the proprietors (from whom the plaintiff derives title) could not be credited to the rent claimed, inasmuch as such payments, being in anticipation of the rent due according to the instalments, were illegal (Clause 3, Section 23, Regulation VII of 1799); and, further, that the receipts for rent filed by the defendants might be construed as receipts for the Government revenue paid by the defendants on account of their own share in the superior estate.

The defendants, in appeal to the Zillah Judge, urged briefly as follows:—That, in the absence of a kubooleut (counterpart of a lease), and as they had received no notice of the creation of plaintiff's intermediate holding, they had made their payments of rent to the superior proprietors; that payments on various dates, amounting in the aggregate to Rs. 188, had been made: further, that payments in anticipation were not illegal.

The Judge held that, as no kubooleut had been filed by the plaintiff, it was a reasonable presumption that, if any assignments had been made to the plaintiff by the superior proprietors, the kubooleut of the defendants would have been handed over to him; that there could be no question that the defendants had paid the sums specified by them to the superior proprietors in ignorance of any assignment to the plaintiff; that the defendants, the lessees, were empowered by a deed, called an "izazutnamah," filed with the record, to pay Government revenue on account of the superior proprietors (hence the receipts referred to); that the late Sudder Court have ruled that, when no proof of notice is given, the lessees cannot be held liable for a double payment; that the Moonsiff was wrong in applying the provisions of Clause 23, Regulation VII of 1799 to this case, as that Clause of the Act relates entirely to lands under attachment; and that the Moonsiff had failed to observe what the Judge points out, *viz.* an express power given by the superior proprietors to pay their share of the Government revenue.

The appeal was decreed, and the decision of the Moonsiff was reversed, with costs payable by the plaintiff.

In special appeal it is urged—

1*st.*—That, as the Court of first instance declared the Collectorate receipts, covering payment on account of Government revenue, to have been for sums paid by the defendants on account of their own share in the superior estate, and refused to give credit for such payments, the Judge is wrong in deducting the sums covered by the receipts from the balance claimed.

2*nd.*—That it was wrong to deduct sums covered by receipts on account of years not included in the claim, as well as sums borrowed, and which had nothing to do with the rent transaction.

This appeal must be dismissed. The judge appears to have determined that the receipts produced by the defendants, the lessees (ticcadars), were for sums which, under the terms of the "izazutnamah," they were bound to pay to the superior proprietors. These receipts, we observe, cover a larger sum in the aggregate than the amount claimed in this suit. The lessees had no notice of assignment by the superior proprietors to the plaintiff before they paid the Government revenue on account of the superior proprietors; and there is no proof on the record that these payments were made on account of the defendants' own share in the superior property. Holding authority from the assignor, the defendants were right in paying the revenue until notice was given of the assignment to plaintiff. We do not find that the Judge credited any sums borrowed, as stated by the special appellant. The finding of the Judge being on a question of fact, and not of law, we cannot interfere with it in special appeal.

The appeal is dismissed, with costs, and interest upon the costs at the rate of 12 per cent. per annum from this date to date of realization, payable by the special appellant.

The 22nd August 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Enhancement—Presumption of occupancy before Permanent Settlement—Auction-purchaser—Special Appeal.

Case No. 425 of 1860.

Special Appeal from a decision of Mr. A. E. Russell, Judge of Moorshedabad, dated the 31st January 1862, reversing a decision of Mr. J. Geoghegan, Deputy Collector of that District, dated the 12th November 1861.

Luteefoonnissa Beebee (Defendant) *Appellant*

versus

Baboo Poolin Behary Sein (Plaintiff) *Respondent.*

Baboos Shumboonauth Pundit and *Dwarkanauth Mitter* for Appellant.

The Advocate General and *Baboos Kishen Kishore Ghose* and *Jugdanund Mookerjee* for Respondent.

To be entitled to the benefit of the presumption created by Section 4 Act X of 1859, there must be a holding at a uniform rate for 20 years next before commencement of suit. A tenant who has held for upwards of 20 years at a uniform rate, but who has been dispossessed by an auction-purchaser for arrears of revenue, and is out of possession at the commencement of the suit, is not entitled to the benefit of the presumption.

A mokurreree tenant is nor exempt from enhancement as against an auction-purchaser before Act XI of 1859, unless his mokurreree was created 12 years before the Permanant Settlement.

A special appeal will not lie upon a question of jurisdiction depending upon a fact not determined by the lower Court or admitted by both parties.

Whether, if the Act appears, a special appeal will lie unless the error in procedure has affected the merits (Section 372 Act VIII of 1859) —*Quære.*

In this case plaintiff sued for a delivery of a kubooleut for 683 beegahs 13 cottahs of land, at the rent ot Rs. 1,077-8. The question raised was, whether the defendant was exempt from enhancement. It was found that the defendant held the land from the year 1227 to 1253, a period of upwards of 20 years, at the rent of Rs. 201. In the year 1253, the plaintiff, who was an auction-purchaser for arrears of revenue, dispossessed the defendant, who remained out of possession until the year 1860. In that year he was restored to possession under a decree of the Civil Court, by which it was found that he held under a mokurruree tenure of long standing, that decree having been affirmed by the Sudder Court on the 5th of February 1859. From the time of his dispossession to the time of the commencement of the suit no rent had been paid. The question is, whether the payment of rent at the rate of Rs. 20, from 1227 to 1253, was a payment within the meaning of Section 4 of Act X of 1859. The Deputy Collector held that such payment was presumptive evidence that the land had been held at that rent from the time of the Permanent Settlement; and that, under the provisions of Section 3, the defendant was entitled to receive a pottah at that rate, and, consequently, was not liable to enhancement. The Judge overruled that decision; and we are of opinion that the Judge was right. Section 4 says—"whenever, in any suit under this Act it shall be proved that the rent at which land is held by a ryot has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period;" and Section 3 enacts that ryots who hold lands at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are entitled to receive pottahs at those rates. These Sections are not accurately worded. If read literally, they would extend to the case of a ryot whose tenancy commenced only three years before the commencement of the suit, and whose rent had not been changed during that period; for the rent, not having had existence for twenty years, could not have been changed during that period. We think the meaning of Section 4 is that, where, at the time of the commencement of the suit, land is held by a ryot, and has been held by him or by some person through whom he claims at the same rent for a period of twenty years next before the commencement of the suit, the presumption specified in the Section shall be made. In other words, there must have been a holding for 20 years next before the commencement of the suit, at a rent which has not been changed during that period. But in this case it cannot be said that the tenant held at the rent of Rs 20 at the time of the commencement of the suit. The auction-sale at which the plaintiff purchased was made before the passing of Act XI of 1859, and the plaintiff was, therefore, not subject to the provision of Section 37 of that Act (*see* Section 1), but was entitled to the benefits conferred upon an auction-purchaser by Act I of 1845. The plaintiff obtained possession in 1253, and never received rent from the defendant after that period. Although the defendant was restored to possession in 1260, he did not, by force of the judgment of the Civil Court, hold of the plaintiff at the rent which he had formerly paid. He was not entitled to hold at that rent as against an auction-purchaser, unless his mokurruree tenure was created 12 years before the date of the Permanent Settlement. The Deputy Collector, having decided in favor of the defendant upon the first two issues, did not find upon the third issue, which raised the question whether the plaintiff, as auction-purchaser, was, or was not, entitled to enhance the defendant's rent. The determination of that issue was not necessary so long as the findings on the first two issues were in favor of the defendant. But when the Judge reversed the decision of the Deputy Collector, it was necessary to determine the third issue. But the Judge has in effect ordered an enhancement without determining that issue. The case must, therefore, be remanded for the purpose of having that issue determined by the lower Court.

A question was raised as to the jurisdiction of the Judge of Moorshedabad. It was said that the lands were situate within the jurisdiction of the Civil Judge of Beerbhoom though they were within the Revenue jurisdiction of the Collector of Moorshedabad. But there was no issue raised as to whether the lands were situate in the Civil district of Beerbhoom or not, nor was there any finding to that effect. There was an allegation by the defendant that, as the lands were situate within the jurisdiction of the Civil Court of Beerbhoom, the suit ought to have been brought in the Revenue Court of Beerbhoom. But, if that fact were true, the inference of law deduced from it was not correct; for, although the appeal would be to the Civil Judge of the district in which the lands were situate, the case was properly commenced before the Deputy Collector of the Revenue district. It was not necessary, therefore, for the plaintiff to dispute the fact in order to show that his suit was properly commenced. No issue was raised upon it, and the parties are not both bound by the allegation in the defendant's statement. A special appeal will not lie upon a question of jurisdiction, depending

upon a question of fact which has not been determined by the lower Court or admitted by both parties. It is very doubtful whether, if the fact appeared, a special appeal would lie, unless the error in procedure might have affected the merits (Act VIII of 1859 Section 372). It was urged, on the part of the plaintiff, that the Judge at Beerbhoom might have found the facts differently, and that the Court, not being able on a special appeal to go into the facts, could not say that the plaintiff may not have been prejudiced on the merits by the case having been tried before a wrong Judge. But in this case the question before the Judge turned upon a question of legal presumption and the construction of Section 4 of Act X. It seems, therefore, that the plaintiff cannot have been prejudiced as to the merits. Sections 375 and 350 of Act VIII of 1859 is here referred to as showing that a judgment may be reversed on a point of jurisdiction on special appeal, but that Section (375) has been repealed by Section 1 of Act XXIII of 1861, and the word "hereinbefore" in Section 25 of the latter Act has reference to the rules laid down by Section 23 of that Act, and not to the rules laid down in Section 350 of Act VIII of 1859. It is unnecessary, however, to decide, in the present case, whether, upon special appeal, this Court can reverse a decision, if, from the facts found, it appears that the lower Court had no jurisdiction in regard to the question in dispute, and it does not appear that either party may have been prejudiced upon the merits. In the present case there is no allegation by which both parties are bound, and no finding to show that the lands are situate in the Civil district of Beerbhoom; and, as both parties submitted to the jurisdiction of the Judge of Moorshedabad, we must assume that he had jurisdiction. It was argued that it does appear that the lands are in the Civil jurisdiction of Beerbhoom, as there was a decision of that Court in evidence by which the defendant was restored to possession; but that decision is no more conclusive that the lands were within his jurisdiction, than the present decision of the Judge of Moorshedabad is the other way. There is no more reason to say that the Judge of Moorshedabad has acted beyond his jurisdiction in the present case, than there is to say that the Judge of Beerbhoom did so in the former case. If the decision of a Judge is conclusive as to his jurisdiction, it would follow that, if there had been no appeal in the present case, the decision now under consideration would be as conclusive against jurisdiction in Beerbhoom as the former decision was against that in Moorshedabad; thus each would negative the jurisdiction of the other, and the two would prove that neither has jurisdiction. We think that there is nothing to show conclusively that the lands are in the Civil jurisdiction of Beerbhoom. Our decree, therefore, is that the case be remanded to the Court below for the trial and determination of the third issue.

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The 23rd August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S Jackson, *Judges.*

Mortgage (Usufructuary)—Suit for possession (by Mortgagor).

Case No. 69 of 1859.

Regular Appeal from a decision of Moulvie Nuzeerooddeen Mahomed, Principal Sudder Ameen of Behar, dated the 7th September 1859.

Brijololl Upadhya and others (Defendants) *Appellants,*

versus

Motee Soonderee (Plaintiff) and others (Defendants) *Respondents.*

Baboos Kishen Kishore Ghose and *Unnoda Presad Banerjee* for Appellants.

Baboos Shumboonauth Pundit and *Gobind Chunder Mookerjee* for Respondents.

Suit laid at Co.'s Rupees 2,49,281-8*a.*-8*p.*-19*k.*

In a suit by a mortgagor against a mortgagee to recover possession of property mortgaged under a zur-i-peshgee lease, the only question at issue was held to be whether all the debts had been paid or whether the plaintiff could re-enter. The correctness of the account might be questioned by the defendant in any future suit.

A SUIT was instituted by the plaintiff to recover possession of certain properties mortgaged under a lease of zur-i-peshgee, and was valued at Rs. 2 49,281-8-8-19.

The plaintiff's allegation was that an ikrarnamah had been executed by her in favor of the defendant, Brijololl, in March 1844, in order to settle a debt due to him by her on account of a decree gained in 1841; that the principal and interest of the same had been cleared off by the usufruct of the properties, and the plaintiff was consequently now entitled to re-enter.

The Principal Sudder Ameen, in an elaborate judgment, went fully into the accounts produced by both parties, and decided that there was still a balance due from the plaintiff of Rs. 86,645, and that, consequently, she was not entitled to recovery.

Against this decision she has preferred no appeal.

The defendant, Brijololl, appeals against that part of the decision of the lower Court which rules that the sum of Rs. 81,645, is still due to him from the plaintiff, his contention being that a sum of Rs. 2,31,798 is owing, and that he is prejudiced by the lower Court deciding that the former amount remains unpaid.

On appeal, after hearing the arguments of pleaders on both sides, we are clearly of opinion that the real and only point at issue in the lower Court and by it decided, was, whether the amount of the debt had been paid off in full or not, and, consequently, whether the plaintiff was entitled to re-enter on the property or not. The question was not one of arrears, more or less, or of any partial balance of accounts between the parties.

The lower Court, in order to decide whether the plaintiff was entitled to re-entry, was compelled to go minutely into the accounts produced as a matter of evidence; but the judgment of that Court can only be held conclusive in the absence of an appeal by the plaintiff on the matter of the recovery of the land. On this part there is no appeal for us to decide; and, in any future case brought by the plaintiff to recover possession, the defendant will be clearly at liberty to question the correctness of any account on which the plaintiff may rely, and which the Court, trying the case, may then have to consider.

In this view, we hold that the present appeal will not lie, and we dismiss it with costs.

The 27th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Mokurreree pottahs granted before Regulation V. 1812—Section 11 Regulation XXVIII. 1828—Omission to pay rent.

Case No. 19 of 1860.

Regular Appeal from a decision of Mr. W. Wright, Principal Sudder Ameen of Bhaugulpore, dated the 6th September 1859.

Umrithnauth Chowdhry and others (Plaintiffs) *Appellants,*

versus

Koonjbehary Singh and others (Defendants) Respondents.

Baboo Shumboonauth Pundit and *Moonshee Ameer Ally* for Appellants.

Moulvies Murhumut Hossein and *Aftabooddeen Mahomed* for Respondents.

Suit laid at Co.'s Rupees 9,000.

The acceptance of rent for 40 years ratifies the original grant of a mokurreree pottah granted prior to Regulation V. 1812.

Section 11 Regulation XXVIII. 1828 (requiring successions to mokurreree tenures to be reported to the Collector within 6 months) refers only to the security of the revenue, and not to private interests.

Omission to pay rent may be good ground for a suit for arrears of rent or for ejectment, but not for the cancelment of a pottah not otherwise impugned.

This is a claim to cancel a mokurruree pottah, dated the 21st of Maugh 1206, or 1799, held by the defendants in an entire village.

The Principal Sudder Ameen has dismissed the claim, holding the pottah not to be liable to cancelment.

The grounds of his decision are that, although the pottah, which, as a deed, is not denied by the plaintiff, was granted previous to the enactment of Regulation V of 1812, Section 2 of which empowered proprietors to grant leases for any period, yet the acceptance of rent from the defendants for a period of forty years since this enactment ratifies the original grant made before the passing of the law of 1812; that any omission to pay rents for the past six years is not to be laid at the door of the defendants who have tendered the same, but at the door of the plaintiffs who have refused to receive it; and that the plaintiffs themselves have further recognised the validity of the grant and the tenure by applying to the Civil Court to put it up for sale.

In appeal it is not attempted to disturb the judgment on the grounds of the original invalidity of the grant. A reference is made by the pleader for the appellant, to Section 11 Regulation XXVIII of 1828 which requires persons succeeding to mokurruree tenures to report the same to the Collector within six months of their succession; but that Section refers only to the security of the revenue and not to private interests, and is not applicable to this case.

It is urged, also, that the defendants admit having paid no rents for the last six years; but the reply to this is, obviously, that it may be open to the plaintiff to sue them for their dues. Omission to pay rent may be good ground for a suit for arrears of rent or for an action for ejectment. It can form no ground in law for cancelment of a pottah not otherwise impugned.

Holding this view, we affirm the decision of the lower Court, and dismiss the appeal with costs.

The 27th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Ghatwals of Beerbhoom—Estate of—Lease by.

Cases Nos. 1 to 4 of 1860.

Regular Appeals from decisions of Mr. O. W. Malet, Judge of Beerbhoom, dated, respectively, the 8th, 9th, and 10th, September 1859.

No. 1.

The Deputy Commissioner of Beerbhoom and others (Defendants) *Appellants,*

versus

Rungololl Deo and others (Plaintiffs) *Respondents.*

Baboo Shumboonauth Pundit for Appellants.

Baboo Jugdanund Mookerjee, Moonshee Ameer Ally, and *Moulvie Lutfur Ruhoman* for Respondents.

The Ghatwals in Beerbhoom are, under Section 2 Regulation XXIX. 1814, possessed of estates of inheritance without the power of alienation, and enduring so long as they perform all the obligations of service and payment of rent to Government incident to their tenure. Consequently a perpetual sub-lease granted *bonâ fide* to a party by a Ghatwal is good not only during the tenancy of the grantor but (after his decease) of his heirs also. The only mode, therefore, in which the heirs (or those acting on their behalf) can legitimately set aside the alleged act of their ancestor, is

not by summary dispossession, but by a regular suit questioning the title set up.

In three out of these four cases before the Court, the plaintiffs sue for possession of their mokurruree villages. They allege that they are mokurrureedars under the leases obtained from the ancestors of the defendant, Ghatwal Ooditnarain, and that they performed the Police service of the Ghatwal; that the property has in consequence of the minority of the present Ghatwal, come into the hands of the Court of Wards, by whom a surburrakar has been appointed; and that this officer has, without warrant of law, dispossessed them of their tenure, which they have held under the Ghatwals for generations past. They, therefore, pray to be restored to the possession of their property.

The plaintiffs in the fourth case allege that they have been in possession of the lands sued for by them, under no written title, for many years; and that they obtained a title for the land, which had been in their possession, from the then Ghatwals in 1244. They, therefore, sue to be restored to possession.

The Deputy Commissioner of the Sonthal pergunnahs, on the part of the Court of Wards, in his answers in all the cases, pleads that the allegations of the plaintiffs, as to their having been in possession of the Ghatwallee tenures, and having performed the Police service required from the Ghatwals, is false, for, had it been true, the defendants would have produced their sunnud of appointment from Government, which they had been unable to do; that the Beerbhoom Ghatwals cannot alienate their tenures, which they hold merely on condition of their performing the Police duties efficiently; that, as the Ghatwal, Ooditnarain, is a minor, and the property has come under the management of the Court of Wards, the Court has appointed a surburrakar, who now collects the rents and performs all the Police duties of the Ghatwals; and that the plaintiffs' suit for possession is altogether untenable.

The Judge was of opinion that, though undoubtedly a Ghatwal in Beerbhoom could not alienate his tenure, the plaintiffs in the present case had clearly shown that they had been in possession of their tenures for more than sixty years, and that, consequently, the act of the surburrakar was unwarranted by law. He therefore gave plaintiffs a decree for possession, with costs.

From the decision passed by the Judge, an appeal has now been preferred to this Court by the Deputy Commissioner of the Sonthal pergunnahs; and it has been contended, on the part of the appellant, that, as Ghatwallee property in Beerbhoom is not, under Regulation XXIX of 1814, strictly speaking, ancestral, but merely held by each succeeding Ghatwal, under a life-tenure, on condition of his performing such service efficiently, he cannot alienate at all, or grant leases for a longer term than his own right; and though, by Section 2 of Regulation XXIX of 1814, the descendants of the Ghatwals are entitled to succeed to the tenure in preference to strangers, this does not alter the nature of the tenure, which in no sense is ancestral; that, consequently, the grant of a mourosee mokurruree tenure by the plaintiff, even if proved, which it is not, would not, as against the present Ghatwals, give them, any title; and, as the surburrakar has seen fit to resume their tenures, they have no valid ground of action in a suit like that before the Court, but their claim to be restored to possession should be rejected.

That the plaintiffs in the four suits were in possession of their several tenures for a long period before they were ousted by the surburrakar, admits, we think, of no question; and, in fact, such possession is not denied on the part of the Government pleader, who appears for the Court of Wards. It is simply contended that no Ghatwal can grant a sub-lease for a period longer than his own life-tenure; and, second, as a consequence of the first contention, that the surburrakar, acting on behalf of the minor Ghatwal, is perfectly competent by law, and therefore is perfectly at liberty, to oust at pleasure any tenant in possession, even though that possession be held under grants made by ancestors of the present Ghatwal.

We think that the Ghatwals in Beerbhoom are, under Section 2 Regulation XIV of 1819, possessed of estates of inheritance without the power of alienation; and that this estate cannot be void so long as they perform all the obligations of service and payment of rent to Government incident to their tenure. It follows that a perpetual sub-lease, granted *bonâ fide* to a party by a Ghatwal, will be good, not only during the tenancy of the grantor, but, after his decease, during the tenancy of his heirs; and, consequently, that the only mode in which these last can legitimately set aside the alleged act of their ancestor is by a regular suit questioning the title set up. The surburrakar, under the Court of Wards has the same power on behalf of the Ghatwals which the minor Ghatwal would have, were he in possession himself, but nothing further; and as the Ghatwal could not, of his own mere motion, dispossess parties claiming to hold under his ancestors and admitted for years in possession under such a claim, neither can the surburrakar do so. The act, then, by which he has dispossessed the plaintiffs in these cases was, consequently, without warrant of law.

Looking, therefore, on three of the present actions simply as claims on the part of persons who had long been in possession of land under titles granted by the ancestors of the present Ghatwals, and on the fourth as a claim on the part of persons who have been in possession, for a series of years, of the lands claimed by them, a possession confirmed by a recent Ghatwal in possession, we think they should be restored to the possession of that which they enjoyed before the illegal arbitrary act of the surburrakar.

We decree to them the possession of what they have been illegally deprived; and it will remain for the surburrakar, if so advised, by a

regular suit in Court, to question the title set up by the plaintiff before us.

Under this view, varying the decree of the lower Court so far as to leave this question of title of plaintiffs untouched, we dismiss these appeals, with costs.

The 28th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Suit by ryot to reverse summary awards for rent—Question for decision.

Cases Nos. 15 to 18 of 1860.

Regular Appeals from a decision of Mr. J. J. Ward, Judge of Cuttack, dated the 12th September 1859.

No. 15.

Muddoosoodun Acharj, father and guardian of Lukhee Acharj, minor,(one of the Defendants) *Appellant,*

versus

Kishore Hazrah and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Taruchnauth Sein for Appellant.

Baboos Kishen Succa Mookerjee and *Obhoy Churn Bose* for Respondents.

In a suit brought by ryots to reverse summary awards for rent, the Court (instead of deciding the question of title between the co-defendants) should merely determine to whom the plaintiffs have paid rent in past years, and their liability for the present year in accordance with their past payments, and the possession of the property evidenced thereby, leaving the contending co-sharers to settle the question of title in a separate suit regularly brought for that purpose.

The four cases which are now before the Court are instituted severally by certain ryots. Bhagbut Rawut, Bustobee Bewa, and others, Bhuggy Rawut and Modhoo Rawut, with a view of procuring the reversal of summary suit by which they have been made liable for the *entire* rents of the lands held by them within the mutkudmee tenure Bhulbudderpore situated in pergunnah Bapprar and Muddoosoodun, the guardian of his minor son, Lukhissur. They allege that the mutkudmee tenure was purchased by Bistochurn, the father of Muddoosoodun, and two other defendants, Narain and Bonmally in the name of Moddoosoodun, his second son; that, after the father's death, in 1253 B. S., the three sons succeeded to their father's estate and held it in joint tenancy till 1264; that subsequently in 1265, they made a partition of the mutkudmee, Narain, the eldest son, taking a six-annas, and the two other brothers a five-annas share each; that, in accordance with the partition, they have paid their rents to the owners of the two shares, and are willing to pay to Muddoosoodun his share; but he, on the strength of the registration of his name on the order of the Judge, has obtained a summary decree for the entire rents of their holding. They sue, in these different actions, to set aside those decrees, as far as regards the rents due on the share of Narain and Bonmally, that is, to eleven annas of the rents decreed.

The defendant, Muddoosoodun, in his answer, pleads that he, on the 4th October 1857, purchased the mutkudmee with his own money; that subsequently, on going to Cabool as a Byraggee, he left his brother as guardian of his minor son, Lukhissur, but the uncles of the boy, in his absence, set up the fraudulent claim to share in the property; that, having returned from the pilgrimage, and taken up the guardianship of his son, who succeeded to his property when he went to Cabool, he now, in assertion of his right, sued for the entire rent due from the ryots for 1265, and obtained a summary decree for the same, which he prays may be upheld.

The defendants, Narain and Bonmally, admit the receipt of the rent for 1265 for their shares of the property from the plaintiffs; and assert that the claim of Muddoosoodun to the whole mutkudmee is fraudulent, and that, since their father's death up to 1264, they were all in joint possession of the property.

The Judge was of opinion that, from the evidence of witnesses, it is clear that the mutkudmee had always been, since the death of the father, held jointly by his three sons; and as the defendants, Narain and Bonmally, admit the receipt by them of rents for 1265, he gave plaintiffs a decree according to the terms of their plaints, with costs.

From the decision of the Judge four appeals have now been preferred to this Court by the defendant Muddoosoodun Acharj. He urges that, in a suit for the reversal of a summary decree for rent brought by ryots, no determination on the question of proprietary right can be made, but the Judge, notwithstanding, has determined the shares to which he and his brothers are righly entitled; that, from the evidence on the record, it is clear that the property was purchased by him with his own monies, and that he was, and subsequently his son has been, in possession of the entire estate; that, consequently, the judgment of the lower Court should be reversed.

In a case like the present, brought by the ryots to reverse summary awards for rent, it is undoubtedly not competent to the Court to decide the question of title between the co-defendants before the Court. In such suits, the action of the Court must be limited to determining the parties to whom, in past years, the plaintiffs have paid rents, and determining their liability for the present year in accordance with their past payments, and the possession of the property evidenced thereby, leaving the different contending co-sharers to settle the difference as to right and title in a separate suit regularly brought for that purpose.

Confining ourselves to this point, as seems also to have been done by the lower Court, we agree

entirely with the Judge in opinion that the joint possession of the defendants in the property of their father, subsequent to his death in 1253, is satisfactorily proved by the evidence adduced by the plaintiffs, and the possession of the defendant, under an alleged purchase by him, entirely disproved. The quarrelling also of the brothers in 1265, and the possession by them of their separate shares in the property in that year is also distinctly proved; and as, moreover, the defendants, Narain and Bonmally, admit the receipt by them, from the plaintiffs, of three shares of the rents for that year, we see no reason for interfering with the judgment passed in the plaintiffs' favor, but dismiss these appeals with costs.

We note that these suits are of very trifling value, and we are of opinion that the Judge, in placing these cases on his own file, has not exercised a sound discretion, the more specially as they present no points of difficulty.

The 30th August 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr and L. S. Jackson, *Judges.*

Mortgage—No Limitation as between Mortgagor and Mortgagee.

Case No. 23 of 1860.

Regular Appeal from a decision of Mr. G. L. Morton, Judge of Tirhoot, dated the 8th September 1859.

Muddun Gopal Singh and others (Defendants) *Appellants,*

versus

Lalla Hunooman Dobay and others (Plaintiffs) and others (Defendants) *Respondents.*

Mr. R. T, Allan and *Moonshee Ameer Ally* for Appellants.

Baboo Kishen Kishore Ghose for Respondents.
Suit laid at Co.'s Rupees 614-2*a*.-2k.

So long as the relation of mortgagor and mortgagee exists between the parties to a suit, the law of limitation will not apply to the case.

The plaintiffs in this case, Lalla Hunooman Dobay and others, first party, and Ramnooghra Singh and Bhanjun Tewuree, purchasers, second party, sue defendants to recover possession and obtain the registration of their names as owners of six-annas out of eight annas of the entire eleven annas mehal, Bhooalpore, pergunnah Busora, with wasilat from 1254 to 1264, *minus* Rs. 258-12 due to the defendants, mortgagees.

Plaintiffs allege that in 1175, or 1768, the ancestors of Hunooman Dobay and others (first party), Deendyal Singh and Dhuroop Singh, mortgaged eight annas of the mehal in suit to Bhowany Singh, the ancestor of the defendants and a co-sharer to the extent of three annas in the mehal; that, subsequently, they instituted a suit for the redemption of the mortgaged property, and obtained a decree, on the 24th January 1803, from the lower Court; that, on appeal to the Provincial Court, that order was reversed on the 16th July 1804, and that Court found that two annas of the eight annas claimed had been conveyed by absolute sale to the defendants, and only six annas was mortgaged, and that the sum borrowed on this six annas had not been repaid in full, but that Rs. 258-12 still remained due to the mortgagees; that the mortgagees subsequently, in 1809, settled with Government for the estates as mortgagees; that various causes have prevented plaintiffs suing before this time for possession of the property; but they now, as the sum for which the property was originally mortgaged has been paid off with interest, sue for possession with wasilat from 1254 to 1264, *minus* Rs. 258-12 due to the defendants, mortgagees, as by decree of the Provincial Court of 16th July 1804.

Defendants plead that plaintiffs have no deed or document of any sort on which to support their present action; that, consequently, it should be thrown out of Court at once; that, moreover, as plaintiffs' ancestors refused to settle with Government at the time of the Decennial Settlement, and allowed the property to be farmed for various periods, they, by such refusal, became only entitled to malikhana and not to possession; that subsequently, in 1804, a Permanent Settlement was made with them (defendants) as proprietors, and they have been in possession ever since; that, consequently, the rights, of whatever nature they may be, which plaintiffs ever may have had, have lapsed by efflux of time, and they are out of Court under the Statute of Limitation. But even admitting that there was a mortgage, as alleged by the plaintiffs, the sum borrowed has not been paid off in full, and plaintiffs' suit should be dismissed.

The Judge was of opinion, from decrees of different Courts which were, before him, passed between the ancestors of the parties now before the Court, dated the 24th January 1803 and 16th July 1804, that the mortgage-transaction, as alleged by the plaintiffs, really existed, and that, on the last-mentioned date, it was not paid off, Rs. 258-12 then remaining due according to the judgment of the Provincial Court; that, moreover in the old Collector's register for 1207 up to 1228, which were called for from the Collectorate and examined by him, the defendant's ancestors were recorded as proprietors and mortgagees of Deendyal Singh's rights in the property; that defendants are unable to show that they have ever legally become the proprietors as well as the mortgagees of the six annas of the estate; and that the assertion, in 1809, that they were proprietors of it, and on the strength of which they obtained the settlement, was fraudulent; that, under such circumstances, limitation will not apply to the present claim; that moreover, as defendants do not contend that the advance on the mortgage has not been cleared off, and as defendants admit the leases to Sheikh Boonyad Ally, than which there can be no better

data for adjusting the wasilat, the usual prescribed course for making the defendants produce and swear to their accounts is unnecessary. The Judge, in conclusion, gave plaintiff's decree for possession with wasilat, as claimed, subject to a deduction of Rs. 258-12, the declared balance due to the mortgagees, specified in the decree of 1804, with interest.

From this decision an appeal has now been preferred to this Court by the defendants below, and it has been contended on their behalf by Moonshee Ameer Ally before us, as much as was contended below, to the effect that the plaintiffs have shown no cause of action as against defendants; that they have been unable to prove that a mortgage-transaction ever existed; that, moreover, by not settling for the estate in their possession at the time of the Decenial Settlement and allowing it, on different occasions between that date and 1809, to be farmed out, they lost all claim to everything but malikhana; that in 1809, the estate was settled by Government with the ancestors of his clients as proprietors, and has been held by them ever since as such; that their title is independent, both in its own nature and in consequence of the time during which it has been held by them unquestioned; that, even if the Court think that the mortgage-transaction has been proved to have had an existence, and that limitation does not apply, still plaintiff is not entitled to possession, as the sum alleged to have been borrowed has not been paid off.

We think that no doubt can be entertained as to the existence, as alleged by the plaintiffs, of a mortgage upon the property now in suit. It is evident, by the decree of the Judge of the 24th January 1803, and by that of the Provincial Court, dated the 16th July 1804, and by this latter document, that the mortgage seems to have covered only six annas of the property then sued for, and not eight annas as was then contended. Moreover, it is recorded in that proceeding that Rs. 258-12 then remained due on the sum borrowed; and the claim of the ancestors of the plaintiffs for possession of the property was consequently rejected. A slur has been attempted to be thrown on the copy of the judgment of the Provincial Court filed by the plaintiff, respondent, because the original bears no seal and signature. The copy seems to have been obtained from the book of the Provincial Court now in this office, in which all copies of decrees passed were entered. On sending for the original book, we find the decree alluded to rightly and formally entered in it. The signature of the Judge of the Court should have appeared on the pages at the commencement and end of the book, and, though they are not now apparent, we see no reason to doubt that the decree entered in the book before us is an authentic document.

Viewing it in that light then, and a conclusive evidence of the existence, in 1804, of an unsatisfied usufructuary mortgage between the ancestors of parties now before us as regarding the very property now in suit, the question that next demands our attention is the fact that, in 1809, the mortgagees, styling themselves proprietors of the six-annas share, obtained a settlement from Government. This act on the part of Government, it is contended, gives to the defendants a title independent in itself, and one, moreover, which laspe of time has, if that were possible, rendered even more secure.

The mortgage having been once proved to exist, that transaction, and no other, can be admitted by the Court as constituting the title of the appellants, mortgagees, before it be shown clearly that, by some legal act, their lower title has been converted into a higher. The act by which this conversion has taken place in the the present case is, as before remarked, the settlement made by Government with them as proprietors in 1809; but this act of Government had no such legal effect as is attached to it by the appellants. On their petition, alleging that they were the proprietors and were in possession, a settlement was made with them; but the fraud which was committed upon the mortgagors by this misrepresentation cannot affect that *bonâ fide* transaction, or enable the defendants in this suit now to benefit by their successful fraud as to the settlement. As against the mortgagors, they were simple mortgagees before 1809, and as such they remained to the present day; and the illegal and fraudulent act of their own can in no way alter that relation. As, then, the relation of mortgagor and mortgagee exists to the present day between the parties in suit, it is clear, as most correctly laid down by the Judge, that the Statute of Limitation will not apply.

An objection was made, though not seriously urged, to plaintiffs' claim for possession, on the ground that, as their ancestors had refused to settle for the property at the time of the Decennial Settlement, but allowed it, on different occasions between 1790 and 1809, to be farmed out, they had, by such refusal, lost all right to possession and could only claim malikhana. But this contention is founded on error. Doubtless, during the continuance of the several farms which were granted between the above dates to third parties, the ancestors of the plaintiffs must have been contented with malikhana; but, on the expiry of each of those leases, they, as proprietors, were entitled to settlement; and what they were entitled to on the expiry of the previous lease they were also entitled to in 1809, had it not been for the fraudulent conduct of the mortgagees noticed above, who, under the claim of being proprietors, obtained a Perpetual Settlement for themselves.

As, then, the relation of mortgagor and mortgagee exists between the parties before us, the only point remaining is for us to ascertain whether the mortgagee has been paid off or not.

This point has not been satisfactorily determined below, and the plaint does not give the Court any data upon which, in the absence of the accounts on the part of the mortgagee,

it could at once pass a satisfactory decree in his favor. The mortgagee, too, pleads the general issue; and, in denying the mortgage, denies also, by implication, that any balance is due on the mortgage. We, therefore, in order to obtain a clear and satisfactory adjudication on the state of the accounts, remit the case to the Judge, with directions that he will, under Section 11 Regulation XV of 1793, call upon the mortgagee to file the gross account of the property mortgaged from 1804 to the date of suit, and to verify the same. He will then give the mortgagor an opportunity of examining the accounts, of offering objections to them, and of filing any paper with a view of clearing that judgment of the Court that he may think fit. The Judge will then, on the consideration of the documents before him, determine whether, accepting the sum of Rs. 258-12 mentioned in the decree of the Provincial Court of 16th July 1804 as the sum then actually due to the mortgagee, the whole sum borrowed, with interest, has since been paid off or not; and pass eventually himself, under the old Code of Procedure, such a decision as the result of his calculation may render just and proper.

The 5th September 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Ameen's Report (in what cases valuable, and in what not).

Case No 26 of 1860.

Regular Appeal from a decision of Roy Taruck-nauth Sein, Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th September 1859.

Baboo Prannauth Chowdhry and others (Plaintiffs) *Appellants,*

versus

Mirnomoyee Chowdhry and others (Defendants) and Kasheenauth Chowdhry (Plaintiff) *Respondents.*

Baboo Poorno Chunder Roy for Appellants.

Baboo Dwarkanauth Mitter for Respondents.

Suit laid at Co.'s Rupees 6,260.

The report of an Ameen, however valuable in clearing up difficulties as to the identity and position of lands, is, generally speaking, of no value in determining questions connected with the possession of lands in dispute in past times.

PLAINTIFF Prannauth Chowdhry, the zemindar of the zemindaree comprising the eight annas of pergunnah Nyhattee, No. 629 on the rent-roll of the Collectorate of the 24-Pergunnahs, sues the defendants, Kasheenauth Roy Chowdhry and others, the zemindars of the other eight annas of the pergunnah, for possession of 626 beegahs of rent-paying land, with mesne profits, during the period of dispossession by the reversal of the Survey Award made in the defendants' favor. He alleges that the land in dispute appertains to mouzah Atturpore within his estate, and that he had always been in possession of the lands up to 30th October 1851, when he was dispossessed by the Survey Authorities.

The defendants claim the lands as appertaining to three villages of their estate, *viz.*, Luckheepore, Ramnathpore, and Bonikistopore, and aver that they have always been in their possession as such.

The Principal Sudder Ameen was of opinion that no reliance could be placed upon the documentary evidence filed by the plaintiff. The papers were private papers, easily fabricated, and have, in the present instance, been fabricated very recently, as might be gathered from their appearance. On the report of the Ameen in plaintiff's favor the Principal Sudder Ameen was not inclined to rely, as it was founded on the evidence of witnesses who live at some distance from the spot and not on that of parties who, from proximity, might be presumed to have special cognizance of that to which they speak. The evidence of the witnesses produced in Court was, the Principal Sudder Ameen considered, indefinite and unsatisfactory, and quite insufficient of itself to disturb the possession of the defendants. He therefore dismissed the plaintiffs' claims, with costs.

Plaintiffs now appeal to this Court, urging that the decision of the lower Court is opposed to the weight of evidence on the record. On perusing, however, the report of the Ameen and the testimony of the witnesses, we entirely agree with the Principal Sudder Ameen in opinion that they are insufficient to support the plaintiffs' claim. The report of the Ameen, however valuable in clearing up difficulties as to the identity and position of lands, is, speaking generally, of no value in determining questions connected with the possession of lands in dispute in past times. Such questions are more satisfactorily determined in Court, where the testimony of the witnesses examined can be subjected to a strict scrutiny, rather than in the Mofussil, where it is subject to no scrutiny at all. We have, therefore, no hesitation in setting aside, with the Principal Sudder Ameen, the report of the Ameen in the present case.

As to the evidence afforded by the jummawasil-bakee papers of 1219, 1244, and 1252, it is altogether worthless, and the testimony of the witnesses on the part of the plaintiff, whose evidence has been read before us, is not that of witnesses cultivating or paying rent for the land in dispute, but that of third persons, who speak to the acquisition by certain ryots of pottahs from the zemindar, and to their witnessing the kubooleuts given by the ryots, and to other matters with which they had no material and no well-experienced connection. Altogether, their evidence is not such as would warrant our placing any reliance upon it.

We therefore, without entering into the case of defendants, affirm the order of the lower Court, and dismiss this appeal, with costs.

The 9th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Auction-purchaser—Leases made after decree—Mesne profits.

Case No. 31 of 1862.

Regular Appeal from a decision of Moulvie Mahomed Huneef Khan, 1st Principal Sudder Ameen of Purneah, dated the 26th November 1862.

Hunooman Doss and others (some of the Defendants) *Appellants*,

versus

Koomeroon-nissa Begum (Plaintiff) and others (Defendants) *Respondents*.

Baboo Kishen Kishore Ghose and *Moonshee Ameer Ally* for Appellants.

Baboo Shumboonauth Pundit for Respondents.

Suit laid at Co.'s Rupees 9,350.

The purchaser at a sale in execution of a decree, obtained by a mortgagee in satisfaction of his mortgage debt, is not bound by leases executed by the mortgagor after decree, unless he has recognized the leases after his purchase by receiving rent from the lessees as such.

When a party is declared entitled to a decree for mesne profits, he is entitled to recover, as those profits, such sums as may have been collected and appropriated by others in wrongful possession, or such sums as he would have collected had he been in possession, and which he was prevented from collecting by having been wrongfully kept out of possession.

This is a suit for recovery of possession, with mesne profits, of mouzah Rajgunge, purchased at a sale in execution of a decree by the plaintiff for Rs. 4,175 on the 10th of November 1859. The plaintiff's allegations are these, *i. e.* that, after his purchase he was put in possession of the village by the Nazir on the 4th of May 1860; but that, in December of that year, the defendants forcibly dispossessed him of the same. He therefore sues for recovery of possession and for mesne profits from the 10th of November 1859 to the date of suit. The plaintiff calculates the value of the land at Rs. 7,700, *i. e.* Rs. 7 a beegah for 1,100 beegahs, and claims Rs. 1,650 for mesne profits at Re. 1-8 a beegah. There are several defendants in the case: one is Muddun Loll Doss, whom plaintiff sues as the principal party concerned in his dispossession; another is Hunooman Doss, who pleads a putnee lease from the judgment-debtors; and a third is Pursun Doss, who avers that he holds a sub-lease from the judgment-debtors also. The answer of Muddun Loll Doss consists of a denial of having dispossessed the plaintiff; but in his pleading he supports the claims of the lessees. These two latter plead that their respective leases, being of date previous to the sale, are valid against plaintiff, auction-purchaser. Upon these pleadings and the evidence adduced in support of them, the Principal Sudder Ameen has found that the defendants have dispossessed plaintiff and that neither of the alleged leases has been proved; further, that, considering the tenor of the answers put in by defendants, they are liable for the amount of the suit and for the mesne profits, and also for the costs in regard to mesne profits. The order of the Principal Sudder Ameen is as follows, namely:—"That the mesne profits are to be determined by investigation in the Mofussil at the time of the execution of the decree, *minus* 10 per cent, for collection charges which ought to be paid by the defendants."

From this decision Hunooman Doss, the putneedar defendant, Pursun Doss, the farmer defendant, and Muddun Loll Doss, defendant, have appealed to this Court.

Their grounds of appeal are, that the putnee and farming leases are good and valid; that the plaintiff himself recognised them as such by receiving the rents: and, as respects Muddun Loll Doss, that as he had no concern with the dispossession of plaintiff he should not be charged mesne profits or costs.

Now the first point for our decision is, whether the putnee lease of Hunooman Doss and the temporary farming lease of Pursun Doss were valid in themselves; next, if they were not valid, whether plaintiff, by receiving rents from these lessees, has admitted their tenancy: lastly whether Muddun Loll Doss is or is not liable to mesne profits and costs. On the first point we must remark that it is admitted that the sale at which the plaintiff purchased was one held in execution of the decree in favor of a mortagagee, the judgment-creditor, and that it was expressly made with the object of realising the amount due under the mortgages Therefore the plaintiff, by his purchase, took all the rights and interests of the mortagagee, and would not be bound to recognize leases given by the judgment-debtors subsequent to the date of the decree. Now it is admitted that the putnee lease of Hunooman Doss and the sub-lease of Pursun Doss are both subsequent to the decree; thus, even were the cases proved to be good and valid otherwise, they could have no legal effect against the plaintiff's claim in this case.

But it is alleged that plaintiff himself in this case recognized the leases after his purchase by receiving payments of rent from the lessees as such. We hold that, if the plaintiff did receive those rents for periods subsequent to his purchase, this would amount to a recognition of the leases, and he would be bound by such recognition; consequently, in that case, the leases could not now be repudiated by him. As to these alleged payments of rents to plaintiff by the lessees, the statement of defendants is that on the 5th of May 1860 Rs. 15, on the 19th of May Rs. 11, were paid to and accepted by the plaintiff for rent from them as recognized lessees. The payments are stated to have been made and the receipts to have been given by the plaintiff's tehsildar. It is not however, proved before us, either that the person named as the plaintiff's

tehsildar was really so, or that he gave the receipts for the rents in question, or that the plaintiff really ever did receive any rents from the lessees on account of the period subsequent to plaintiff's purchase. The plaintiff therefore is not bound in any way by the alleged putnee lease of Hunooman Doss or the alleged farming lease of Pursun Doss.

In regard to mesne profits, we have first to decide whether Muddun Loll Doss should be exempted from this part of the decree against him, as he claims he ought to be. We find that he pleads that he ought to be exempted because he had nothing to do with dispossessing the plaintiff. After carefully considering the evidence which has been placed before us on this point, we are clearly of opinion that it is proved that he was the chief agent in dispossessing the plaintiff; and, further, that the two lessees, Hunooman Doss and Pursunt Doss, are shown to have been the servants of Muddun Loll Doss. Thus, as the acts of Muddun Loll Doss deprived the plaintiff of possession, and by such loss of possession by plaintiff others were enabled to appropriate those mesne profits which plaintiff, had he not been so dispossessed, would have received, Muddun Loll Doss, as the party so dispossessing plaintiff, should be liable for those mesne profits.

The next question is whether the plaintiff shall receive mesne profits from the date from which he claims them, namely, the 10th of November 1859, the date of his purchase.

Now, the plaintiff's statement in his plaint is that he received possession through the officer of the Court on the 4th of May 1860, and was dispossessed in December of that year. If it were shown that he (plaintiff) held actual possession, such as would enable a party to collect his rents, of course plaintiff could not claim, as mesne profits on account of rents, sums which he had actually collected when in such possession; but the plaintiff's Counsel here before us orally states that the possession given by the Court was merely symbolical, and that, from the date of the purchase, plaintiff was prevented from collecting, and therefore the Counsel makes a demand of mesne profits on account of what plaintiff was prevented from collecting. Now, we are clearly of opinion that, when a party is declared entitled to a decree for mesne profits, he is entitled to recover, as those profits, such sums as may have been collected and appropriated by others in wrongful possession, or such sums as he (the party ousted wrongfully) would have collected had he been in possession, and which he was prevented from collecting by having been kept wrongfully out of possession; because one or other of these descriptions of profits are profits which have been lost *in the meantime* to the party ousted, that is, during the interval of his wrongful dispossession by others. But, although the above claim for mesne profits which the plaintiff was prevented from realizing has been put before us here *orally* by the Counsel for the plaintiff, still, on a reference to the written plaint, we find that the plaintiff has there claimed only such sums as he states have been actually collected and appropriated by the defendants, and has in no way claimed as mesne profits any sums on the averment that he has been prevented from collecting them. We cannot of course, in such a case, give a plaintiff more than he asks for in his plaint, and therefore any further remarks upon this point are unnecessary.

Lastly, as to costs. On this point Muddun Loll Doss, as appellant, urges before us that he is not a lessee, nor is he sued as such; further that his plea in the Court below was that he was unconcerned in the act of dispossessing plaintiff. Now, in the first place, the answer of Muddun Loll Doss was not only that he was not concerned in dispossessing plaintiff, but he there added that the leases of the defendants (lessees) were good and valid leases as against plaintiff's title. This defendant, therefore, in reality contested plaintiff's title just as much as the lessees did; and having done so, and those leases having been found invalid against plaintiff's title, Muddun Loll Doss must, even upon this ground, pay those costs which plaintiff has incurred in establishing his title against those alleged lessees. But we further hold that this defendant (appellant) is liable to costs upon other grounds also—namely, because he has been proved by the evidence to have been a principal agent in dispossessing the plaintiff, and he, therefore, should pay those costs to which plaintiff has been put in order to recover possession.

Under this view of all the facts of this case, we dismiss the appeal of appellants. The plaintiff (respondent) will recover possession of mouzah Rajgunge; he will receive as mesne profits what he states to have been collected by the opposite party during their wrongful possession; *i. e.* what he claims in his plaint on that account, subject to the exact amount having to be ascertained by a local enquiry in the usual manner. Neither appellant will be exempted from costs. Interest at 12 per cent. per annum will be charged on those costs till paid.

The 9th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Plaint—Verification—Relief sought—Res judicata—Jurisdiction.

Case No. 139 of 1862.

Regular Appeal from a decision of Mr. E. G. Birch, Officiating Judge of Zillah Purneah, dated the 18th February 1862.

Ranee Roshun Jehan (Plaintiff) *Appellant,*

versus

Syed Enayut Hossein and others (Defendants) *Respondents.*

Baboo Shumboonauth Pundit and *Mr. H. Stainforth* for Appellant.

Messrs. R. T. Allan and *W. Tayler*, *Baboo Kishen Kishore Ghose* and *Moonshee Ameer Ally* for Respondents.

Claim laid at Co.'s Rupees 8,32,068-15-7.

The verification of a plaint signed with the name of the plaintiff by her mookhtear, and which does not aver what is false, but attempts to do what the law estops her from doing, is not a false verification within the meaning of Section 24 Act VIII of 1859.

If a plaint not only asks for relief which a Court can afford, but seeks to open up matters already adjudicated upon in another suit, the Judge (instead of rejecting the plaint for prolixity under Section 29) should entertain the suit and adjudicate upon the matters not adjudicated upon in the former suit, amending the plaint by striking out the issues relating to the matters adjudicated upon.

THIS suit was instituted on the 7th of May 1860 in the Court of the Principal Sudder Ameen of Purneah. The suit, at an early stage, was transferred to the file of the Judge of the same zillah.

The plaint, after giving a history of the family of the late Rajah Deedar Hossein, the common ancestor of the principal parties to this suit, proceeds to decree that the plaintiff is entitled, according to the Mahomedan law, to inherit a certain share of the estate, real and personal, derived from her paternal grandfather, the aforesaid Rajah Deedar Hossein.

The plaint further sets forth the extent of the share, and how, and through whom, the title has become vested in the plaintiff. It is further alleged that, during the minority of the plaintiff, Musst. Khoolam, the mother and guardian of the plaintiff, did, fraudulently and in collusion with the respondent, Syed Enayut Hossein, and his legal advisers, file a deed of compromise in a suit pending in appeal from the decision of a former Zillah Judge, Mr. G. Loch, in the Sudder Court; that, when this deed of compromise was filed, the plaintiff was still a minor, and she had no cognizance of the transaction.

The plaintiff avers that she attained majority on the 9th of July 1859, and was married to Rajah Ahmed Rizza; that she filed a petition in the Sudder Court, denouncing the fraudulent character of the deed of compromise filed by her mother, and praying for a review of judgment and for an investigation into the conduct of her guardian; that the Sudder Court, on the 6th of March 1860, referred her to a regular suit. The prayer of the present plaint is that the will and hibbanamah (deed of gift) propounded by the principal defendant, Enayut Hossein, the deed of compromise, the petition alleging that the plaintiff had reached majority, the power of attorney in the names of Moonshee Enayut Ally and Uzgur Ally, the receipt for monies paid on account of maintenance, be set aside as forged, and that the title of the plaintiff may be declared, and possession with mesne profits may be awarded to her of the real and personal property to which she is entitled in right of inheritance. The extent and description of the property claimed is given in a statement annexed to the plaint.

The written statement of the principal defendant, Rajah Enayut Hossein, is briefly as follows—

1*st*.—Exception is taken to the institution-stamp.

2*nd*.—That Abdool Hossein and Musst. Lodun died after the demise of Nusseeroodeen Hossein, the father of plaintiff, and that, therefore, plaintiff's claim to interest from Abdool Hossein and Musst. Lodun is inadmissible.

3*rd*.—Defect of parties.

4*th*.—That the plaintiff has not stated with precision the date of her birth.

5*th*.—That the deed of compromise, alluded to in the plaint, was filed through pleaders and mookhtears of the Sudder Court. The heir of one of the pleaders has not been made a defendant, nor one of the mookhtears.

6*th*.—That the plaintiff came of age while the suit was pending in the Sudder Court, and that the deed of compromise was filed in the aforesaid Court after the plaintiff had attained her majority.

7*th*.—That there is great enmity between the answering defendant and Syed Ahmed Rizza, the husband of the plaintiff, and that much litigation has been and is still going on between the parties.

8*th*.—That the plaintiff, through her guardian, brought an action to annul the deed of gift and will executed by the late Rajah Deedar Hossein; that these deeds were upheld by the decision of the Zillah Judge: no appeal was preferred. The present suit to set aside the aforesaid deed is inadmissible under Section 2 Act VIII of 1859.

9*th*.—That the amount claimed as mesne profits is grossly exaggerated.

10*th*.—The value of the personal property, as stated in the schedule annexed to the plaint, is incorrect and over-estimated.

11*th*.—That the mehals Baranussee, of which plaintiff sues for possession, are the property of Musst. Kadreeoon-nissa, and not of the answering defendant; that the aforesaid lady has not been made a party to the suit.

The above is a mere abstract of the written statement, but the main points have been noticed.

The issues in this suit were fixed by a former Judge of the zillah, and those in bar were overruled. The suit was then taken up upon the merits by the Officiating Judge, Mr. E. G. Birch, who, on the 18th February 1862, rejected the plaint under the provisions of Section 29 Act VIII of 1859.

It appears that the pleader for the defendants in the lower Court took exception to the verification of the plaint, inasmuch as Mr. Gouldsbury, the plaintiff's pleader, was not competent to verify. This objection of the defendants' pleader was overruled by the Judge. The Judge, in his decision, observes that Mr. Money, Counsel for the plaintiff, on opening his client's case, stated that the plaint did not correctly represent the suit he had to bring before the Court, inasmuch as it sought for a reversal of the decision of

a former Zillah Judge (Mr. G. Loch), dated the 5th September 1855, and for a declaration that the deed of gift and the will filed in that suit were forgeries; that such decision could not be interfered with by any Court other than a Court of Appeal; that the object of this suit was to obtain from the Court a declaration that a deed of compromise, alleged to have been filed by the plaintiff in the appeal before the Sudder Court, was fraudulent and collusive, and put in by the defendant, Enayut Hossein; that, on obtaining a declaration to this effect, his client would be able to move the Sudder Court to revive the appeal. The Judge proceeds to observe that the learned Counsel for the plaintiff admitted that the plaint in this suit had been improperly drawn out by his client's pleaders, and that it raised many irrelevant points for adjudication, such as the Court was precluded from adjudicating upon, but that he would ask the Court for a decision upon *those averments of the plaint which had not been adjudicated* upon by the former Zillah Judge, Mr. G. Loch.

It appears, from the Judge's judgment, that the pleader (Mr. W. Tayler) for the defendant objected to this, and urged that a plaintiff coming into Court must stand or fall by the plaint put in as the foundation of the suit, and that a suit must be decided "*secundum allegata et probata*;" further that the plaintiff had come into Court alleging that a deed of gift and a will executed by the late Rajah Deedar Hossein were fraudulent and spurious, and praying that the Court would cancel them and award to her a share of the entire properties covered by those deeds; that the Court could not, as suggested by the Counsel for the plaintiff, adopt half and ignore half of the allegations contained in a plaint; in short, that the suit should be dismissed. The Counsel for the plaintiff appears to have urged, in reply, that though the pleader who drew up the plaint was wrong in law in supposing that the plaintiff, as a minor, was not bound by the act of her guardian, and had introduced in the plaint a claim to a share in the property which had already been adjudicated upon by a Court of competent jurisdiction, still he was entitled to go on with his client's case upon the merits, omitting the "*inutile*" and adopting the "*utile*," and to get a decision from the Court regarding the property included in the suit, the title to which had accrued to his client subsequent to the decision of the former Zillah Judge, Mr. G. Loch. The Judge proceeds to remark that the suit in its present shape cannot proceed; that the plaint is prolix; and, that, although his predecessor in office had admitted the plaint and the mass of documents filed in support thereof, still the plaint was so confused and prolix, that he (the Judge) would not have admitted it; that, were he to allow the plaint to remain on the record and to take up only those portions of the plaint which the Counsel might select for adjudication, he should be obliged to allow the record to remain burthened with a mass of documentary evidence consisting of 167 separate documents, engrossed on 705 sheets of stamped paper, little of which would bear upon the averments of the plaint which the Counsel of the plaintiff might elect to bring before the Court; and, in the event of the case going before the Privy Council, the Judge would subject himself to the censure recorded by that Court in the suit noted in the margin.* The Lower Court added that if ever there was a plaint calculated to prejudice, embarrass, or delay the fair trial of an action, it is the one which is on the record as the basis of this suit; that the present plaint contained particulars other than those required to be specified, and much that is irrelevant; and that the Counsel for the plaintiff admitted that much of the plaint is irrelevant, and that such admissions go against his client. The *order* of the Judge was that the plaint be rejected under the provisions of Section 29 Act VIII of 1859.

* Bunwaree Lall *vs.* Maharajah Hetnarain Sing, 7 Moore's Privy Council Reports, p. 168

In appeal to this Court the plaintiff (appellant) urges—

1*st*.—That a plaint once formally admitted by a Court of competent jurisdiction cannot be rejected under the provisions of Section 29 of Act VIII of 1859, and more particularly after the defendants had been summoned and had put in appearance in Court.

2*nd*.—That the Zillah Court had put a mistaken construction upon the meaning and purport of the arguments of the appellant's Counsel in the lower Court.

3*rd*.—That the arguments of the Zillah Judge are without weight, and that the order of rejection should be set aside.

The respondents, in their written answer to the grounds of appeal, urge—

1*st*.—That, as the plaintiff had admitted the invalidity of the plaint, the lower Court was competent to reject it.

2*nd*.—That the lower Court fully understood the meaning and purport of the arguments of the Counsel for the plaintiff.

3*rd*.—That the plaint was liable to rejection; nay, further, that the suit ought to have been dismissed; and that the plaint was not verified by a legally-constituted agent.

4*th*.—That the costs of the respondents should have been awarded by the lower Court.

The above is a sufficiently detailed abstract of the statements of the parties and of the decision of the Judge for the purposes of this appeal.

With respect to the verification of the plaint, we find, on reference to the plaint, that the form of the verification is regular and correct, but that the verification is irregular.

The plaint is signed with the name of the plaintiff by the pen of her mookhtear (attorney). The signature or sign-manual of the plaintiff is wanting. Mr. Gouldsbury affixes his signature to the plaint, but Mr. Gouldsbury does not profess to declare that the plaint is true. There does not appear to be any false statement in the plaint. The plaintiff, it is true, asked for more

than the law allowed her to do, and sought to re-open a question that had been adjudicated upon by a Court of competent jurisdiction. This was a mistake of law. The plaintiff was undoubtedly wrong in acting as she did; but we are of opinion that the plaintiff has, in no way, rendered herself liable to the penalty for false verification laid down in Section 24 of Act VIII of 1859.

The plaintiff may be estopped from questioning the decision of the former Judge, Mr. G. Loch; but she is not estopped from averring that certain documents alluded to in that decision are forged. The decision of Mr. Loch would not be sufficient evidence to convict the plaintiff of perjury. It is an assertion on one side and a decision on the other. The object of the doctrine of *res adjudicata* is to prevent harassment, and to fix some limit to litigation. A decision on a fact is not necessarily correct; it is simply conclusive as between the parties thereto, who are estopped from averring contrary thereto. The plaintiff has been wrong to this extent: not that she had averred what is false, but that she has attempted to do what the law estops her from doing.

For these reasons we are of opinion that no exception can, at this stage of the case, be taken to the plaint on the ground of any defect in the verification.

We now come to the question whether the Judge was right in rejecting the plaint under the provisions of Section 29 of Act VIII of 1859. Section 29 enacts as follows:—

"If the plaint do not contain the several particulars hereinbefore required to be specified therein, or if it contain particulars other than those required to be specified, whether relevant to the suit or not, or if the statement of particulars be unnecessarily prolix, or if the plaint be not subscribed and verified as hereinbefore required, the Court may reject the plaint, or, at its discretion, may allow the plaint to be amended."

The discretion given to the Courts under this Section is a large one, and this discretion should be exercised with caution. Incalculable mischief may be done by an indiscreet application of this Section. It may so happen that a party may lose his remedy altogether under the Statute of Limitations by the application of this Section, to say nothing of the institution-stamp fee, which, in a case like this, amounts to the large sum of Rs. 2,000.

The particulars alluded to by the words "hereinbefore required to be specified" (Section 29) are the name and place of abode of the plaintiff; the name, description, and place of abode of the defendant, so far as they can be ascertained; the relief sought for; the subject of the claim, and when it occurred, and the grounds, if any, for claiming exemption from the Statute of Limitations; and, further, if the claim be for land or any interest on land, the nature of the tenure or interest must be specified. Now the plaint in this suit is not defective in any of these particulars; it was considered admissible by a competent Court, and was entered in the register of Civil suits prescribed in Section 38 of the Act. The statement of particulars is not prolix, making due allowance for the habits and modes of thinking of native suitors and their agents. The suit involves property to a very large extent; and a plaintiff, in attempting to be brief in his statement, runs the risk of becoming obscure.

It is clear that, if the plaint contained any allegation which the plaintiff was stopped from averring, the Judge was at liberty to direct the plaint to be amended and such allegations to be struck out; but the admitting Judge neither rejected nor amended the plaint. He admitted it, and, after disposing of the issues in bar, proceeded to settle and fix the issues on the merits. The suit proceeded in the ordinary course, and another Judge, at a late stage of the case and when it was ripe for decision, rejects the plaint. We certainly think that, even admitting that the Judge had the power to do so, which we think he had not, it was a very severe exercise of that power.

The Judge has laid much stress upon the admissions of the learned Counsel for the plaintiff in the lower Court. We find that all that the Counsel did admit was that the plaint sought to re-open questions of fact that had already been adjudicated upon, and that, to this extent, the plaint was irregular; but he distinctly asked for a decision "upon those averments of the plaint which had not been adjudicated upon by the former Zillah Judge, Mr. G. Loch." It is also clear that the plaint contains other allegations wholly irrespective of those which question the decision of Mr. Loch; and, further, that properties, the title to which, it is alleged, accrued to the plaintiff subsequent to that decision, are involved in the suit and form part of the plaint.

The Judge might have struck out all the allegations which referred to the deeds which had been adjudicated upon by Mr. Loch; and, under Section 141 of the Act, he was competent to amend the issues or to frame additional issues at *any time* before the decision of the suit; and this was the course which the Judge, in our opinion, ought to have taken.

With reference to the remarks of the Judge, that, "were he to allow the plaint to remain on the record and to take up only those portions of the plaint which the Counsel might select for adjudication, he should be obliged to allow the record to be burthened with a mass of documentary evidence, little of which would bear upon the averments of the plaint which the Counsel for the plaintiff might elect to bring before the Court, &c.," we would observe that, by Section 39 Act VIII of 1859, a plaintiff must file with his plaint all documents upon which he relies as evidence in support of his claim; and that no documents, not presented with the plaint, can be received at a later stage of the case without the sanction of the Court. The Judge is not accountable for the number of the documents produced by a plaintiff in support of his claim. All documents put in by the parties to the suit *must be received*; but, under

Section 129 of the Act, the Court is competent to reject any document which it may consider irrelevant or otherwise inadmissible. If, therefore, the plaintiff has put in a mass of irrelevant documents, or documents which have reference to a question that has already been decided by a competent Court, the Judge is at liberty to reject such documents and to rid the record of their presence. The decision of the Privy Council, alluded to by the Judge, animadverts upon the lax system of receiving documents as evidence which are not evidence, and does not rule that documents are not to be received, because they happen to be numerous.

We therefore hold that the Judge should not have rejected the plaint, but he should have amended the issues upon the merits, striking out such issues as referred to points which had been adjudicated upon by a former Zillah Judge, Mr. Loch, and then have proceeded to a trial of the remaining issues. We, therefore, reverse the decision of the Judge and remand the suit for trial with reference to the above remarks. Costs to follow the result of the suit. The plaintiff (appellant) is entitled to a hearing and trial without filing a fresh institution-stamp. The amount of the stamp used by the plaintiff in her appeal to this Court must be refunded to her under the provisions of Note F, Schedule B of the Stamp, &c., Act X of 1862.

The 11th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Alluvial lands (washed away and reformed on old recognized—site), if identified, can be claimed.

Case No. 42 of 1862.

Regular Appeal from a decision of Baboo Koylas Chunder Bose, Principal Sudder Ameen of Rajshahye, dated the 9th December 1861.

Romanauth Tagore and others (Plaintiffs) Appellants,

versus

Chundernarain Chowdhry and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Aushootosh Dhur* for Appellants.

Baboos Shumboonauth Pundit, Sreenath Doss, and Gopeenauth Mookerjee for Respondents.

Suit laid at Co.'s Rupees 14,773-7-7.

Lands washed away and afterwards identified as reformed on the old recognized site, are not lands "gained" within the meaning of Section 4 Regulation XI of 1825. Lands so reformed or identified remain the property of the original owner.

WE are of opinion that the word "gained" in Section 4 Regulation XI of 1825 does not extend to cases of land washed away and afterwards reformed upon the old site which can be clearly recognized. *In such a case* we think the land formed by accretion on the old recognized site remains the property of the owner of the original site. It never could have been intended that where the surface of an estate is washed away, and the lower portion of it is covered with water and formed into a portion of the bed of a river, the ownership of that portion of the estate which has become inaccessible in consequence of its being covered with water should be lost; and that, when the surface is reformed, it should become the property of an entirely different owner, because he may happen to be the owner of the estate adjoining. If such were the case, if A had an estate between a river and the estate of B, and A's estate were washed away, leaving B's estate adjoining the river, B would become the owner of A's estate if it should be gradually reformed on the old site. Such a case would not fall within Clause 2 Section 4. But it would fall within the same principle. The cases in Clause 2 are given only as examples, and not as the only cases in which land acquired by accretion can be clearly recognized as having been formed on the site of an old estate. The principle is that, where the accretion *can be clearly recognized* as having been reformed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner. This is founded on general principles of equity and justice, which are the principles recognized by the 5th Clause. We think Clause 1 Section 4 applies only to cases of land gained, that is to say, formed upon a site which *cannot* be recognized as that of any former proprietor. The case must be remanded to be tried with reference to the above remarks. The compensation referred to as given by Act IX of 1847 is merely a diminution of the amount payable to Government as revenue. But this would be no compensation to a man, the whole of whose estate has been washed away, if, when reformed, it is to belong to a different proprietor. He will have to pay no revenue. But he will have no estate. We may remark that, in this case, the plaintiffs do not rely solely upon the fact of reformation, but they claim at least some portion of the land reformed by accretion as being annexed to their estate. This point will also have to be determined.

Ordered, that this case be remanded and tried *de novo* upon the merits with reference to the above remarks.

The 13th September 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Limitation—Mode of calculating.

Case No. 38 of 1860.

Regular Appeal from a decision of Syed Ahmed Buksh, Principal Sudder Ameen of Mymensingh, dated the 22nd November 1859.

Hurro Soonderee Dabea (Plaintiff) *Appellant,*

versus

Kally Mohun and others (Defendants) *Respondents.*

Baboo Onooool Chunder Mookerjee for Appellant.

Mr. R. T. Allan for Respondents.

Suit laid at Co.'s Rupees 11,662-8.

The day on which the cause of action arises should be included in the period of limitation.

The days on which a former suit respectively commenced and ended should count, in deducting from the period of limitation, the time during which former suit was pending.

THIS is an appeal against the dismissal of a suit under the law of limitation, the lower Court having held that the suit was instituted 13 years, 3 months, 27 days after the cause of action, and not having allowed for a time during which a case, previously brought by the same plaintiff but non-suited, had been pending. The main facts being admitted by both parties, the matter is one for calculation. Now, the cause of action arose on the 21st of August 1845 by a sale in execution of a decree. The plaintiff brought her first suit on the 18th August 1857. It remained pending until the 14th of December 1858 when it was nonsuited, and the present suit was brought three days afterwards, on the 17th of December 1858.

It is urged that, if the period allowed for sueing after the cause of action had arisen, as well as the period of the pendency of the first suit, be calculated on correct principles and under the precedents in force, the plaintiff will be found to be in time. We hold, under the precedent of the case reported at page 1232 of the 16th of September 1859, (case of Brijo Kishore Dhur), that the day on which the cause of action arose must be included in the twelve years' limitation. In this case the twelve years will begin to run on from the 21st of August 1845. Then, looking to the rule prescribed in the Circular Order, No. 45, of the 1st of March 1844, which we hold to be applicable to the acts of the Court trying the case, it appears to us that the plaintiff must have the benefit of the whole period, from the 18th of August 1857, to the 14th of December 1858, both days inclusive; and that the period must be deducted from the twelve years. Applying the above precedent and Circular Order, the plaintiff will be found to have brought her first case 11 years, 11 months, 27 days from the date of her cause of action; and, deducting the period for which that suit was pending, she had three days still left to make up the twelve years, of which she availed herself by instituting the present suit on the third and last day, or on the 17th of December 1858. Under these circumstances, she is just in time, and has a right to have her case decided on its merits.

No evidence having been taken, we must remand the case to the lower Court for that purpose. The Principal Sudder Ameen will take the case up at once out of its turn, receive the evidence tendered, and decide the case on its merits.

The 15th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Exparte decree—(Default of appearance by defendant).

Case No. 145 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. E. Lautour, Judge of the 24-Pergunnahs, dated the 18th November 1861, *affirming a decree of Mr. E. Lockwood, Deputy Collector of that District, dated the 25th March* 1861.

Gholam Eshak (one of the Defendants) *Appellant,*

versus

Hyder Moollah and others (Plaintiffs) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Kally Kishen Sein for Respondents.

In the absence of any statement that the case had been decided *exparte* by the Deputy Collector for default of the defendant's appearance, the Judge, on appeal by the defendant, dismissed it on the merits. HELD that no special appeal will lie on the ground that the Judge should have dismissed the appeal without going into the merits.

THE defendant not having appeared before the Deputy Collector, the case was decided *ex-parte* against him. He appealed to the Judge, but did not state that the case had been determined *ex-parte* on account of his non-appearance. The appeal was admitted, and afterwards heard and dismissed with costs, upon the merits. The defendant now appeals upon the ground that the Judge decided wrongly upon the merits. The plaintiff objects that an appeal did not lie to the Judge under Section 58 of Act X of 1859. We think that an appeal did not lie to the Judge; and that, having admitted the appeal in the absence of any statement that the case was decided *ex-parte*, he was right in dismissing the appeal, with costs. Although he might have dismissed it, with costs, upon the ground that an appeal would not lie, we cannot reverse his decision upon the ground that he ought to have dismissed it without going into the merits. If we were to go into the merits and find that the Judge was wrong in dismissing the appeal, we should still have to say that he ought to have dismissed it upon the ground that the original decision was passed *ex-parte*. We could not say that the Judge ought to have reversed the decision of the lower Court and reverse that decision ourselves, for that would be contrary to Section 58. The object of that Section was that parties should not lie by without excuse and then appeal from the decision, when that decision might never have passed if they had appeared and brought

their case properly before the lower Court. If the defendant can show good and sufficient cause to the Deputy Collector for his non-appearance, he may now do so, as process for enforcing the judgment has not been executed; and if he can satisfy the Deputy Collector that there has been a failure of justice, the Deputy Collector may review the suit and alter the decree according to the justice of the case upon such terms as he may think proper.

It is, therefore, ordered that this appeal be dismissed with costs, and interest upon such costs, from this date until realization thereof, at 12 per cent.

The 16tn September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Interest—Payment of Revenue by Co-sharer.

Case No. 101 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. R. Abercrombie, Judge of Dacca, dated the 6th November 1861, *affirming a decree of Mr. J. C. Dodgson, Collector of that District, dated the 23rd July* 1861.

Goluck Chunder Roy and others (Plaintiffs) *Appellants*,

versus

Juggurnauth Roy Chowdhry and others (Defendants) *Respondents*.

Baboo Onoocool Chunder Mookerjee for Appellants.

Baboo Sreenauth Doss for Respondents.

Section 20 Act X of 1859 (providing for payment of interest on arrears of rent) is not applicable to a case where the defendant is not a tenant of, and does not pay rent to, the plaintiff, but is a co-sharer by purchase from the plaintiff under an arrangement that, until the completion of a mutation, the defendant should pay through the plaintiff his quota of the Government revenue, and that, after mutation, the relation between the plaintiff and defendant should be an independent one.

The plaintiffs sued the defendants for an alleged arrear of rent for a period extending from 1256 to 1267 B. S. (twelve years), with interest. Both the lower Courts decreed the principal but refused to award interest.

The special appeal raises one point—whether interest ought to have been awarded or not. Section 20 Act X of 1859 is quoted.

On referring to the deed filed by the plaintiff, and upon which his claim is based, we find that the defendant is not the tenant of the plaintiff but a co-sharer, by purchase, of the same estate. The defendant does not pay "rent" to the plaintiff; the provisions of Section 20 are, therefore, inapplicable to the claim of the plaintiff.

The deed states that the defendant purchased from the plaintiff a fractional share of the pergunnah, the Government revenue payable upon the share thus purchased being Rupees 43-12. It was arranged that the vendee was to apply to the Collector for mutation; and that, until the mutation was completed, the vendee was to pay the above quota of the Government revenue through the plaintiff; and that, after the mutation, the connection between the plaintiff and defendant was to be an independent one. This being the only point raised by the appeal, we confirm the decision of the lower Court and dismiss this appeal, with costs, bearing interest, at twelve per cent. per annum, from this date to the date of realization.

The 16th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Jurisdiction (of Collector)—Defence—Section 97 Act VIII of 1859 (not applicable to suits under Act X of 1859).

Case No. 219 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. L. S. Jackson, Judge of Nuddea, dated the 21st November 1861, *reversing a decree of Moonshee Fuqueer Ahmed, Deputy Collector of Bongong, dated the 8th July* 1861.

Doyal Chunder Ghose and others (Plaintiffs) *Appellants*,

versus

Dwarkanauth Misser and others (Defendants) *Respondents*.

Baboos Aushootosh Chatterjee and *Onoocool Chunder Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose and *Obhoy Churn Bose* for Respondents.

The jurisdiction of a Collector under Act X of 1859 is not affected by the nature of the defence set up.

Section 97 Act VIII of 1859 does not apply to suits instituted under Act X of 1859.

The plaintiffs sued to recover possession of a gantee tenure from which they alleged ejectment by the defendants. The defendant answered that the tenure had been purchased by him from the plaintiffs and filed a bill of conveyance The Deputy Collector gave the plaintiffs a decree. On appeal, it was held that the suit was one of which the Collector could not take cognizance; that "the issue of fact between the parties was whether defendants were trespassers or *bonâ fide* purchasers of the plaintiffs' rights; and that such a question could only be decided by the ordinary Civil Courts." The Judge further observed "that a suit had been previously instituted on this very cause of action, and, before final judgment, the plaintiffs filed a deed of compromise and withdrew from the suit: that the plaintiffs now allege that the understanding with defendant, upon the faith of which the

plaintiffs withdrew their claim, was not carried out; but as the plaintiffs withdrew voluntarily from their suit without permission to bring a fresh suit, they seem to come clearly under the provisions of Section 97 Act X of 1859."

The decision of the Deputy Collector was reversed.

We are of opinion that this suit, in the form in which it was brought, was cognizable by the Collector, and not by any other Court, under Clause 6 of Section 23 and the latter portion of Section 23 of Act X of 1859. It did not cease to be a suit cognizable by the Collector because a particular kind of defence was set up. Of course, the Collector would have to decide whether the defence set up were false or true; but his jurisdiction is not affected by the nature of the defence set up with reference to the withdrawal of the plaintiffs from the suit by filing a deed of compromise. It has been contended, by the pleaders for the special respondents, that the plaintiffs have lost their original cause of action, and ought to have sued for breach of the terms of the compromise; but we find that the plaintiffs did not give up their cause of action, nor is there any reference made in the deed of compromise to any action for damages in case of a breach of its terms. The plaintiffs must be permitted to bring a fresh suit on the original cause of action, or their remedy will be entirely lost to them. This brings us to the consideration of whether Section 97 of Act VIII of 1859 in any way precludes the plaintiffs from bringing a fresh action.

Section 97 of Act VIII of 1859 enacts as follows:—"If the plaintiff, at any time before final judgment, satisfy the Court that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the same matter, it shall be competent to the Court to grant such permission on such terms, as to costs or otherwise, as it may deem proper. In any such fresh suit the plaintiff shall be bound by the rules for the limitation of actions in the same manner as if the first suit had not been brought. If the plaintiff withdraw from the suit *without such permission*, he shall be *precluded* from bringing a *fresh suit for the same matter*."

Now, if this Section applies to suits under Act X of 1859, it is clear that the plaintiffs would have been precluded from bringing a fresh suit on the same matter, inasmuch as they had withdrawn from the suit without obtaining the permission of the Court to bring a fresh suit; but we are of opinion that the above Section is not applicable to suits brought under the provisions of Act X of 1859. Under this last Act, which, in an enactment passed subsequent to Act VIII of 1859, a certain class of suits, as detailed in Section 23 of the former Act, are made cognizable by the Collector, and by the Collector alone, the present suit falls within the provisions of Section 23, and is, therefore, a suit which is not cognizable by the Civil Court. *Act X lays down a course of procedure* to be followed in the trial of suits brought under the Act. This procedure varies from the procedure laid down in Act VIII, and there is *no enactment that, in all other respects, the procedure shall be governed by Act VIII of* 1857. If the Legislature intended that the procedure under Act VIII was to be applicable, *in its entirety*, to suits under Act X, it would have been obviously unnecessary to enact such Clauses as Clause 67 and Clause 161 in the latter Act. The whole of the procedure of Act VIII would have been imported without any reservation into Act X. For the above reasons we are of opinion that Section 97 of Act VIII does not apply to suits instituted under Act X; and, as there is no law which precludes plaintiffs from bringing a fresh suit when they found that they were not to have the benefit of the compromise, they are entitled to sue.

We reverse the order of the Judge and remand this suit for trial on the merits. Costs to follow the result of the suit.

The 24th September 1862.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Enhancement (when and to what extent allowable)—Principle of proportion disallowed—Rent (definition of)—Respondent (Right of—to urge objections) under Section 348 Act VIII of 1859 in special appeal).

Case No. 1607 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. Elphinstone Jackson, Additional Judge of Nuddea, dated the 31st May 1862, *affirming a decree of Moulvie Yatazad Hossein, Deputy Collector of that District, dated the 8th February* 1862.

Ishore Ghose (Defendant) *Appellant,*

versus

James Hills, Manager of the Savi Indigo Concern in Nischindepore (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Messrs. R. V. Doyne and J. Woodroffe for Respondent.

In a suit for enhancement on the ground that the value of the produce of the land had increased independently of the agency of the ryot, the Judge on appeal held that the plaintiff was bound to show that the value of the produce had increased in proportion to the increased rent claimed. HELD that, though the Judge was right in considering that the proper mode of estimating the value was with reference to the value of the produce or rather to the value of the produce as it existed at the time of the increase, he was wrong in introducing the principle of proportion, inasmuch as the Act does not say that the increased rent shall bear the same proportion to the original rent as the increased value does to the original value.

The amount of the increased rent is not to be ascertained by establishing a proportion between the former rent and the old produce; but the absolute increased value of the produce being ascertained, the enhanced rent is to be arrived at by considering what part of such in-

creased value ought to be apportioned to the tenant as the produce of his capital, labor, &c., and what part of it is *rent* as defined by Malthus, *viz.* "that portion of the value of the whole produce which remains to the owner of the land after all the outgoings belonging to its cultivation of whatever kind have been paid, including the profits of the capital employed, estimated according to the usual and ordinary rate of agricultural capital at the time being."

Rent cannot be enhanced beyond the rate demanded in the plaint and notice, or in respect of such part of the land as has not increased in value.

In special as well as in regular appeal, a respondent may, under Section 348 Act VIII of 1859, show that points decided against him ought to have been decided in his favor—e. g. where a tenant, appellant, seeks to reduce the amount of enhancement decreed, the respondent may show that the enhancement ought to have been more than that decreed.

THIS was a suit brought by a durputneedar to recover arrears of rent at an enhanced rate. The rent formerly paid was at the rate of five annas four pie per beegah. The plaintiff, by his notice of enhancement, claimed one Rupee per beegah. The enhancement was claimed on the ground that the value of the produce of the land had increased independently of the agency of the ryot. The notice to enhance was admitted. The Additional Judge of Nuddea held that it was incumbent on the plaintiff to show that *the value of the produce had increased in proportion to the increase of rent asked for; and that, if he could show that the value of the produce had doubled, he would be entitled to recover double the former rate of rent; and that, if it had trebled, he could treble the rent, and so on.* He found that, in fact, the value of the produce of the *matan* lands had doubled; that no increase in value had been proved as regarded the produce of the higher lands; and he considered that, without some evidence on the point, the increased value of the produce of the lower lands was a sufficient ground to justify an increase in the rate of rent of the higher land. Applying the principle which he had laid down to the facts found, he held that the plaintiff was entitled to double the former rent, but not to more for the *matan* lands; and that he was not entitled to any increase of rent in respect of the other lands. The tenant appealed from the decision; and it was contended, on his behalf, that the plaintiff, being merely a durputneedar, was not entitled to enhance the rents of the ryots; but this objection was overruled in the course of the argument, upon the ground that there was no evidence to show that, upon the creation of the plaintiff's tenure, he was restrained from enhancing the rents. It was further *contended, on the part of the tenant, that, as it appeared that the expenses of cultivation had increased, the Judge ought to have deducted the amount of the additional expenses from the increased value, and ought not to have doubled the rent.* On behalf of the plaintiff it was argued that the Judge was wrong in holding that it was incumbent on him to prove that the value of the produce had increased in proportion to the increase of rent demanded. In answer to the plaintiff's objection, it was urged, on behalf of the defendant, that the plaintiff was not at liberty to impugn the decision of the Judge, as he had not appealed against it; and a distinction was drawn between a regular and a special appeal. We hold that there was no distinction, and allowed the plaintiff to go into his case. By Section 161 Act X of 1859, the rules relating to appeals from the subordinate Civil Courts are made applicable to appeals from decisions under that Act. By Section 348 Act VIII of 1859, it is enacted that, upon the hearing of an appeal, the respondent may take any objection to the decision of the lower Court which he might have taken if he had preferred a separate appeal from such decision. By Section 375 of the Act, the above provision is extended to special appeals. Section 375 was repealed by Section 1 Act XXIII of 1861. But Section 25 of that Act declares that a special appeal shall proceed in all respects other than those provided by the Section (which do not apply to this case) as a regular appeal. The object of the enactment was to enable the Appellate Court to do complete justice to both parties. In special appeals the power of the Appellate Court is limited to the correction of errors in law. But for the liberty given to a respondent by the Section above referred to, injustice might frequently be done. A party may be satisfied with the decree of the lower Court, and may be willing to allow it to stand unimpeached if his opponent does not think it necessary to appeal; but he may not be willing to have the decree modified or altered upon appeal in favor of his opponent without having the whole decree set right. Suppose a defendant sets up two defences to a claim brought against him, and the lower Court determines in his favor as to one of them, and against him as to the other, the plaintiff's claim would be dismissed. The lower Court might be wrong as to both defences, and ought to have decided in the defendant's favor the defence which was decided against him, and *vice versâ*. If the plaintiff were to appeal, and to reverse the decision of the lower Court upon the defence decreed in the defendant's favor, it would be unjust not to allow the defendant, if he could, to show that the lower Court was wrong in point of law in determining the other defence against him, for he might thereby be able to show that the lower Court was substantially right in dismissing the plaintiff's suit, though wrong as to the defence which barred it. This reason applies to special appeals with as much force as it does to regular appeals. *We therefore hold that the respondent might (under Section 348 Act VIII of 1859) take any objection to the decision of the lower Court which he might have taken if he had preferred a separate special appeal.* We must, therefore, examine the objections of both parties.

The *ground of enhancement* is the increase of the *value of the produce*, not of the productive powers of the land. We have, therefore, first to ascertain what the value of the actual produce was, and to what extent it has increased. We have nothing to do with the question what the actual produce might have been if the lands had been cultivated differently, and may, therefore, leave out of consideration entirely that part of

the judgment of the lower Court which relates to the extent or cause of the decrease in the quantity of produce. The Additional Judge was right in considering that the proper mode of estimating the value was to look at the produce, or rather at the value of the produce as it existed at the time of the increase. The Judge has found the fact, *viz.* that the value of the produce of the *matan* lands is double what it was formerly, the produce being now in most cases worth six Rupees a beegah instead of three Rupees. It is not necessary to go more minutely into the value as found by the Judge; and we will, therefore, take six Rupees per beegah as the increased value in round numbers, and three Rupees per beegah as the former value. The Judge says that it was incumbent on the plaintiff to show that the value of the produce has increased *in proportion* to the increase of rent for which he asks; and, as he finds that the increased value is double, he declares that the plaintiff is entitled to double the former rent. The question for our consideration is, whether the principle upon which the Judge has acted is correct. We are of opinion that it is not. *The mistake has arisen from introducing the principle of proportion. The Act does not say that the increased rent shall bear the same proportion to the original rent as the increased value does to the original value, but merely that the rate shall be fair and equitable.* It is not proved that any rule of proportion was adoped in fixing the original rent; and even if such rent were fixed upon the principle of allowing the landlord a particular portion of the gross produce or of the net profits, it would not follow that the principle must be acted upon in fixing the rent under the new state of circumstances, having reference to the increased value of the produce. But even, if such principle were acted upon, the rule of proportion would not apply. Suppose the rent was fixed originally upon the principle of allowing the landowner a money-rent equal to one-third of the gross produce. If that principle were acted upon after the increase of the value of produce, the landlord would be entitled to one-third of the three-rupees increase, or to one Rupee in addition to the old rent, which would give him one Rupee five annas four pie per beegah instead of the one Rupee demanded. The Judge does not seem to have drawn a clear distinction between limiting the extent of the enhancement by the grounds of enhancement and limiting it by a rule of proportion. It is clear that the increase may be limited in extent without adopting the rule of proportion. He says:—"It may also be, and this I consider the correct view, that the Legislature has considered that the rate of rent which a ryot is paying, after he has been allowed to remain twelve years in possession, may by that time be considered to have been fairly adjusted, and to be therefore fair and equitable; and it has settled that it can be enhanced only on certain grounds and to the extent to which those grounds apply to it. However this may be in the suit for enhancement which the plaintiff has preferred, I am clearly of opinion that such enhancement can take place only as far as the ground on which it is claimed has been proved." So far the Judge is correct. It may be admitted that, upon the facts found, the plaintiff could not enhance the rent beyond the full amount of the increased value, or, in other words, that he could not be entitled, in a suit for enhancement of rent or in a suit to recover rent at an enhanced rate, to more than the original rent in addition to the full amount of the increase; but up to the extent of the old rent, *plus* the increase, he would be entitled to recover whatever amount would be fair and equitable. In this particular case the landowner has limited his demand by his notice of enhancement to one Rupee per beegah, and he cannot, of course, recover more. But the Judge proceeds:—"It will be incumbent on him, *therefore*, to show that the value of the produce has increased in *proportion* to the increase of rent he asks for, as though it were a necessary consequence of the enhancement being limited by the grounds which apply to it, that it should also be limited by some rule of proportion. Further, the Judge thinks that the rule which would be applicable to the second ground on which rents can be enhanced under Section 17 must also be applicable to the first and third grounds. Assume that this is so, and it entirely destroys the rule of proportion. He says that, under the second ground of enhancement, the increased rent must bear the same proportion to the former rent as the increased value of the produce bears to the former value, that is, to something else than the former rent. But how can this apply to the first ground of enhancement? In that case the former rent may be enhanced to the full amount of the rates prevailing in the places adjacent, if they be fair and equitable, but not beyond them. The enhancement in such case is limited by the rates in the places adjacent, but not on the principle of proportion. When we speak of the rates in the places adjacent, we mean rates subject to the limitations of Clause 1 Section 17. We are of opinion that the rent cannot be enhanced beyond the amount warranted by the ground of enhancement stated in the notice, but that it may be enhanced, so far as that ground warrants, up to a fair and equitable amount. It must be remarked that Section 17 does not direct that the rent of the previous year shall be enhanced if the value of the produce has been increased otherwise than by the agency or at the expense of the ryot, but merely that it shall be liable to enhancement on that ground, that is to say, liable, if the former rent is not fair and equitable under the new state of things. Circumstances might occur in one year which might cause the value of the produce of a farm to increase in that year; but it might be proved beyond doubt that those circumstances were merely temporary and not likely to exist in the following year. In such a case the increase would not be a sufficient cause for enhancing the rent for the following year, for it is the rent of the ensuing year, and not the rent of

the past year, that is liable to enhancement. The ryot may have been very fortunate by force of temporary circumstances in 1862; but that would be no ground for increasing his rent in 1863 and transferring all the benefit of his good fortune to the landowner. Section 17 does not say to what extent the rent is to be enhanced in the case of a ryot having a right of occupancy, and we have already shown that the rent is not necessarily to be increased in the same proportion as the value of the produce, and in that proportion only. Injustice might be done in many cases by increasing in proportion. It might possibly happen that the circumstances which caused the increase in the value of the produce also caused a great increase in the expenses of cultivation. It would be unjust, in such a case, to take the amount of the increase in the value of the produce without any deduction as the basis of the enhancement. Section 5 enacts that ryots having rights of occupancy, but not holding at fixed rates, are entitled to receive pottahs at fair and equitable rates; and Section 9 enacts that the tender to any ryot of a pottah such as he is entitled to receive shall be held to entitle the person to whom the rent is payable to receive a kubooleut from the ryot; and by Section 81 a decree for a kubooleut has the same effect as a kubooleut executed by the person required to execute it. The landlord may, therefore, in any case in which he is entitled to enhance, tender a pottah at a fair and equitable rate, and compel the tenant to execute a kubooleut. It follows, therefore, that when the rent is enhanced under the provisions of Sections 13 and 17, it is to be enhanced to a fair and equitable rate; but as Section 17 says it is not to be enhanced except on one of the grounds mentioned therein, it follows that, in a suit for enhancement, the enhancement cannot be made without regard to those grounds. In such a case, if the increased expenses of cultivation should be equal to the amount of the increase of the value of the produce, there would be no enhancement. In the present case the increase was caused, *not* by an increase of the *quantity* of produce, *but* by an increase of the *value* of it; in fact, the quantity was rather below the average of former years. The produce of each beegah of the matan land is found to have sold for six Rupees instead of three. The increase is, therefore, three Rupees per beegah. The probabilities are that the expenses of cultivation of the same quantity of land, producing crops rather short of the average than in excess of it, cannot have greatly exceeded the expenses of former years. Indeed, we do not find that the tenants ever contended, or proved, in the Court below, that the expenses of cultivation had increased. If the expenses were the same, and the proceeds were six Rupees per beegah instead of three, there was a clear profit of three Rupees per beegah after paying the former rent, and allowing for the profit which the ryot derived from the holding when the produce fetched only three Rupees per beegah and the rent was five annas four pie. The former rent, in the absence of proof to the contrary, must be deemed to have been fair and equitable, that is, that it sufficiently remunerated the ryot for the expenses of cultivation including the use of stock, whatever it might be; the fair wages for labor, whether that of hired laborers or that of the ryot himself and his family; the return of capital and interest upon such capital, whether that of the ryot or borrowed from a mahajun; and a fair allowance for the risk of loss or deficiency of crops. Assuming the expenses to continue the same, the share of the three-rupees increase which may be allowed to the ryot, whatever it may be, will be added to his former profits. If the former profits merely remunerated him for his labor, the share of the increase which he will get will be in addition to the remuneration for his labor. The question is, how is the three-rupees increase to be divided? *The ryot is entitled to a right of occupancy, but only to a right of occupancy at a fair and equitable rate; but this does not entitle him to receive the whole of the three-rupees increase.* If his former rent were fixed at a very low rate, he is entitled to the benefit of that rate. It cannot be enhanced in a suit for enhancement except upon one of the grounds mentioned in Section 17; but when an increase in the value of the produce has been proved, in fixing the portion of the increase which should be added to the former rent to render it fair and equitable, we must look at the former rent. A larger portion of the increase might be allotted to the tenant if his former rent were very high, than would be allotted to himself were it very low. His right of occupancy gives him a right to occupy at a fair and equitable rate; but when an alteration in the rent is to be made in consequence of an increase in the value of the produce, he is not entitled, in strictness, to have it fixed at a lower rate than that which a tenant not having a right of occupancy would give for it. We speak merely of a simple right of occupancy, for that is all that the ryot has been found to have in the present case. Mr. Woodroffe, who argued this case very ably, referred us to Mill on Political Economy, vol. i., page 507. It is there said:—"Any land yields just as much more than the ordinary profits of stock, as it yields more than what is returned by the worst land in cultivation. The surplus is what the farmer can afford to pay as rent to the landlord, and since, if he did not so pay it, he would receive more than the ordinary rate of profit, the competition of other capitalists, that competition which equalizes the profits of different capitals, will enable the landlord to appropriate it. The rent, therefore, which any land will yield, is the excess of its produce beyond what would be returned to the same capital if employed on the worst land in cultivation." A definition more useful for our present purpose is that given by Mr. Malthus in his Principles of Political Economy. He there defines rent to be "that portion of the value of the whole produce which remains to the owner of the land after all the *outgoings* belonging to its cultivation of whatever kind have been

paid, including the *profits* of the *capital* employed, estimated according to the usual and ordinary rate of agricultural *capital* at the time being." The word "outgoing," used in the above definition, must include a fair and equitable rate of wages for the labor employed in the cultivation of the lands, whether that of hired laborers paid out of capital, or the labor of the ryot himself or of his family, and also, when the rent is paid in money, the labor and expenses of carrying the produce to market or of converting it into money. We can only say that, in point of law, *the landlord is entitled to receive a fair and equitable rent, and that he is entitled to have it so adjusted with reference to the grounds of enhancement as to give him a fair and equitable rate.* The rent cannot exceed the old rent with such portion of the increase added to it as will render it fair and equitable under the altered state of circumstances. If the former value of the produce was sufficient to cover all the costs of production, including fair profits as well as reasonable wages, the three-rupees increase is in excess of the costs of production, assuming the costs of production to remain the same. In determining whether the whole of that three Rupees, or any and what portion of it, is to be added to the rent, the Judge must be guided by all the circumstances of the case. In the absence of proof to the contrary, he may take the old rent as a fair and equitable rent with reference to the former value of the produce. He must take into consideration the circumstances under which the value of the produce has increased, and whether those circumstances are likely to continue, and whether the value of the produce is likely to keep up to the present average in the ensuing year. He must also consider whether the costs of production, including fair and reasonable wages for labor and the ordinary rate of profits derived from agriculture in the neighbourhood, have increased, and he must make a fair allowance on that account. We cannot lay down any better rule for his guidance than that which we have quoted from Mr. Malthus. It is not for us to determine the question of fact; we can only lay down the rule of law; but judging, as far as we can, from the facts found by the Judge, it appears to us that the rent demanded by Mr. Hills is very reasonable, for he asks for only ten annas eight pie in addition to his former rent out of the three-rupees increase. The rent cannot be enhanced in respect of those lands of which the produce has not increased. The case must be remanded in order that the rent may be enhanced to a fair and equitable rate, so far as such enhancement is warranted by the ground of enhancement mentioned in the notice. *The rent fixed must not exceed the amount of one Rupee per beegah demanded by the notice.*

It may be a question whether the rules laid down in Sections 13 and 17 apply where a ryot, having a right of occupancy, sues for a pottah under Section 23 Clause 1 and Section 5; or where a landholder sues a ryot having a right of occupancy for a kubooleut, under Section 23 Clause 1 and Section 9. In such a case the Court would, according to Section 5, have to determine what is a fair and equitable rate, and to order a pottah or a kubooleut at that rate, the discretion of the Court in fixing the term of the pottah being limited by the rules laid down in Section 76, by which such term cannot in any case exceed ten years. In fixing the rent in such a suit, the rate previously paid must, according to the provisions of Section 5, be considered to be fair and equitable, unless the contrary be shown. But whether, in such a suit, the landholder could show that the rent previously paid was not fair and reasonable without proof of the existence of one of the grounds specified in Section 17 (as, for instance, by showing that, for some cause or another, the land has been held for the last twelve years at a nominal rent which was to continue merely for that period), is a question which does not arise in this suit, which is for the recovery of arrears of rent at an enhanced rate. The provisions of Sections 13 and 17 are undoubtedly applicable to this case; and we avoid expressing any opinion upon the question to which we have above adverted, as any such expression of opinion would be merely an *obiter dictum*, and, consequently, not binding in a suit of a different nature. We allude to the subject merely for the purpose of pointing out that any expression of opinion in this case is not to be considered as necessarily applicable to a case in which the question as to what is a fair rent may arise in a suit for a pottah or kubooleut. In this case no question was made as to the tenant's right of occupancy. It is unnecessary, therefore, for us to determine whether Section 6 is retrospective or not. There is another case now before us in which that point has been raised. The question is now under consideration, and judgment will be given shortly after the re-opening of the Court.

The 3rd November 1862.

Present :

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Suit for share of joint inheritance—Plea of Limitation—Issue for decision.

Case No. 54 of 1862.

Regular Appeal from a decision of Moulvie Syed Imdad Ally Khan Bahadoor, Principal Sudder Ameen of Rungpore, dated the 7th December 1861.

Musst. Indurmonee Dabea, Guardian of Prosunno Coomar Moitro, minor (Plaintiff) *Appellant,*

versus

Rajnarain *alias* Nitye Chand Mozoomdar and others (Defendants) *Respondents.*

Baboos Shumboonauth Pundit and *Sreenauth Doss* for Appellant.

None for Respondents.

Suit laid at Co.'s Rupees 9,608.

In a suit for a share of joint inheritance where the defendant pleads limitation, the issue for decision is not whether the plaintiff was in possession up to date of suit, but whether the joint possession continued up to any time within the period of limitation.

In this case plaintiff sued upon a claim by right of inheritance to 8-16ths of certain property with mesne profits. The defendants pleaded that plaintiff's suit was barred by the law of limitation.

The Principal Sudder Ameen has held that the plaintiff has given no proof of her possession, up to date of suit, of the 8-16ths she sues for; and that, although some witnesses speak of plaintiff's joint possession at times, there is no sufficient evidence adduced by plaintiff as to her possession of the eight-annas share of the properties mentioned in the suit. The Principal Sudder Ameen thereupon dismissed plaintiff's suit as barred by the law of limitation.

Plaintiff appeals, and urges that the Principal Sudder Ameen was wrong in holding her barred altogether on the ground that she did not prove her possession to the 8-16ths for which she sued; and the pleader urges that, when plaintiff sued as a joint sharer, it was for the Principal Sudder Ameen to find whether, as such joint sharer, she had not had any possession at all of the joint property for twelve years antecedent to the date of suit.

On the hearing, the respondents did not appear. We find that the objection taken by appellant is a valid one.

The plaintiff sued clearly as a joint sharer: defendant pleaded that the suit was barred by the law of limitation. We observe the suit was instituted within two years of the passing of Act XIV of 1859; by Section 18, therefore, of that enactment the new law of limitation does not apply. The case must then be determined by the old law, *i. e.* Section 14 Regulation III of 1793. Thus, it was for the Principal Sudder Ameen to put in issue and decide whether plaintiff ever was a joint sharer, and, if so, whether the joint possession continued up to any time within the period of twelve years next before the commencement of the suit. If such possession continued within that period, plaintiff was entitled to have her share of the profits of the estate, whatever that share might be, whether it was an eight-annas or any less share. The defendants, in their statement, admit that they had sent to the plaintiff, within twelve years, some portion of the rents of the estate; the case is not, therefore, barred by the Statute of Limitation. It must be remanded to determine and declare to what share, if any, the plaintiff is entitled, and what amount the defendants have received on account of her share of the profits, and to determine the case generally upon the merits.

The 5th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Limitation (in Pauper suit)—Commencement of suit—Stamp duties leviable.

Case No. 58 of 1862.

Regular Appeal from a decision of Baboo Nobin Kristo Pandit Bahadoor, Principal Sudder Ameen of East Burdwan, dated the 3rd December 1861.

Golucknauth Dutt and others (Defendants) *Appellants,*

ve

Seetaram Gower and others (Plaintiffs) *Respondents.*

Baboo Dwarkanauth Mitter for Appellants.

Mr. R. T. Allan for Respondents.

Suit laid at Co.'s Rupees 13,440.

In computing the period of limitation in a pauper suit, the commencement of the suit must be reckoned from the day when the *application to sue in formâ pauperis was filed*, and not from the day when the application was admitted. Stamp duties to be levied from applicant.

In this case the plaintiffs were bound to prove that either they or their uncle, under whom they claim, were in possession within twelve years next before the commencement of this suit.

We are of opinion that the suit was commenced when the application to sue in *formâ pauperis* was filed.

By Section 308 of Act VIII of 1859, the application, if allowed, is to be deemed a plaint. The application in the present case was admitted. It therefore became a plaint, and we have to say when that document, which is now to be deemed a plaint, was filed. Certainly it was filed on the day on which it was presented as an application.

If this were not so, cases in which the period of limitation is one year, might be barred whilst the Judge is considering whether the application to sue in *formâ pauperis* ought to be admitted. In this very case the application was not admitted until more than one year had elapsed after it was presented.

If the uncle or the plaintiffs were in possession, as alleged, down to Srabun 1255, the suit was in time, for that date corresponded with the 19th of July 1848, and the application to sue in *formâ pauperis* was presented on the 10th April 1860, though not allowed until the 3rd of August 1861. The first two witnesses speak merely from report: Muneerooddeen says he saw the two plaintiffs dispossessed in 1255; Abdool Busheek says he saw the uncle dispossessed in 1255. The plaintiffs, in their statement, allege that the uncle died in Falgoon 1259, and they were not entitled until his death. This shows that the evidence of Muneerooddeen cannot be cor-

rect. If the uncle had been in possession down to 1255, better evidence might have been adduced to prove the fact than these two witnesses. The uncle, according to the plaintiffs' evidence, must have been out of possession more than four years without taking proceedings to recover possession. Behary Chowkeedar and Beeprodoss Chowkeedar do not show when the uncle was dispossessed.

We think that the evidence was not sufficient to prove that the uncle or the plaintiffs were in possession within twelve years next before the application to sue in *formâ pauperis* was filed.

The appeal is therefore decreed and the judgment of the Court below reversed, with costs of the suit below, and of this appeal, with interest thereon at twelve per cent. from this date to the date of realization thereof.

The stamp-duties, which would have been necessary on plaintiff's proceedings if he had not been admitted to sue in *formâ pauperis*, must be calculated, as he is liable for them to Government.

The 5th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Plaint (Verification of)—Authentication of signature—Parties neglecting to appear as witness on plea of rank.

Case No. 38 of 1862.

Regular Appeal from a decision of the Principal Sudder Ameen of East Burdwan, dated the 8th February 1862.

Rammohun Mookerjee and Joykisto Banerjee (Defendants) *Appellants*,

versus.

Rajah Nursing Deb (Plaintiff) *Respondent.*

Baboos Shumboonauth Pundit and *Jugdanund Mookerjee* for Appellants.

Baboos Kishen Succa Mookerjee and *Banee Madhub Banerjee* for Respondent.

A Court ought not to allow any other person than a plaintiff to verify a plaint except only (as provided by Section 28 Act VIII of 1859) when the plaintiff is unable by absence or other good cause to subscribe it. When the plaint is not presented by the plaintiff in person, the Court should be satisfied that the verification is actually signed by the plaintiff.

If a party of rank sues to set aside a deed as forged, and the facts are within his own knowledge, he cannot be allowed to plead as an excuse for his absence and neglect to give evidence himself, that persons of his station in life in this country have a prejudice against appearing and deposing in a Court of Justice. The best evidence must be given to the Court.

THIS is a suit instituted by Rajah Nursing Deb against Rammohun Mookerjee and Joykisto Banerjee. It is brought to set aside a deed of sale, dated the 29th of Pous 1263 B. S., corresponding with the 11th of January 1857, purporting to convey the property in suit to Rammohun Mookerjee, the principal defendant, upon the ground that the deed was never executed by the Rajah.

The Rajah also seeks to set aside an order of the Board of Revenue, dated the 9th of June 1858, which, upon the faith of the deed, authorized the property in dispute to be registered in the name of Rammohun Mookerjee in the Collector's register of mutation of names; and he claims to recover possession of the property made over to the defendants by the alleged conveyance, and mesne profits during the period of defendant's possession.

The real question to be decided by us in this case is, whether the above deed of sale is a genuine or a false document.

The deed of sale purports to convey one-half share of certain villages, the profits of which share, after deducting the expenses of collection, amount to Rupees 550 per annum. The consideration stated in the conveyance is Rupees 10,200 made up as follows, *viz.*: 700 alleged to have been paid at the time of the execution of the deed, and former debts from the Rajah to Rammohun, amounting to Rupees 1,943, for which decrees had been obtained; and Rupees 7,557, secured by bond, for which no decrees had been obtained: one of the decrees (No. 102) was in process of execution. The numbers of the notes by which the Rupees 700 were paid are stated in the conveyance, and the same notes were paid into the treasury in discharge of revenue due from the Rajah.

Though the Rajah denies the execution of the deed of sale, yet he admits that the decrees had been obtained against him, and that No. 102 was in process of execution.

A bond executed by the Rajah to Rammohun dated Cheyt 1262, corresponding with April 1856, had been proved to our satisfaction. The bond was for the payment of Rupees 7,243, and interest at 12 per cent. at the expiration of one year, and consequently was not payable until Cheyt 1263, corresponding with April 1857, which was after the date of conveyance.

The Rajah, it appears, lives within the jurisdiction of the Civil Court of East Burdwan, and at no very great distance from the Court: yet he did not himself verify his plaint in the manner prescribed by Section 27 Act VIII of 1859.

The fact alleged, *viz.* that the deed was not executed by the Rajah, was a fact within his own knowledge; and, had the Rajah verified his plaint, that act would have been equivalent to his deposing in person that he never executed the deed of sale. Now, upon such a subject, the Rajah himself would have been deposing, not only respecting a matter within his own knowledge, but of a matter of which he certainly was the most capable person to speak; and, in regard to the credibility of his verification, the Court would have had the further security, that it would

have been made under the sanction of a solemn declaration for which he would have been liable to the penalties attaching to the crime of giving false evidence, had his declaration been false to his knowledge. But, instead of verifying the plaint himself, an agent verified for him. This agent could only speak to the best of his knowledge and belief, whereas the Rajah might have spoken positively. A verification by agent is in some cases permitted, where, in consequence of absence or other good cause, the principal is unable to subscribe the verification. The prejudices of natives of high rank against coming into Courts of justice cannot even be urged as a reason why the Rajah did not himself sign the verification, for he might have signed it at his own house, and his personal attendance at Court was not necessary. We have frequently observed that, in the Mofussil Courts, plaints are allowed to be verified by agents instead of by the parties themselves, and we therefore take this opportunity *most prominently to enjoin upon the Zillah Courts of all grades* that it is an error on their part ever to allow other than the plaintiff to verify the plaint, save strictly under the exceptions which the law permits: Section 28 of Act VIII of 1859 allows it only where the plaintiff, by reason of absence or other good cause, is unable to subscribe it. We consider it of *the very highest importance* for the due administration of justice that plaintiffs should, in all practicable cases, verify their own plaints. The Courts and the parties themselves should be aware that a false verification entails upon the parties making it the penalties in the Penal Code attaching to the crime of giving false evidence. Further, we would remark that, whenever the plaint is not presented by the plaintiff in person, the Court should be satisfied that the verification is actually signed by the plaintiff. With reference to the above remarks, we notice that the defendant, Joykisto Banerjee, has himself verified his own written statement, in which he has alleged that the conveyance was executed by the Rajah, and has detailed the circumstances under which the property was sold. For this statement, if not true, he is responsible.

The written statement of Rammohun Mookerjee is, we observe, verified by an agent without sufficient excuse; but upon this point it is unnecessary for us to remark. Further, stress has been laid upon the fact that Rammohun Mookerjee produced the bond of Cheyt 1262 before the Collector at the time of the application for the mutation of names; and it was urged, on behalf of the Rajah, that, if the deed of sale were a genuine document, the bond was substantially paid off, and ought to have been given up to, and would have been found in the hands of, the Rajah under the usual admitted practice. Strictly speaking, no doubt the bond should have been given up; but still, under all the circumstances of the case, it is not, in our opinion, unreasonable to suppose that Rammohun should have retained the bond by way of having some document to prove the consideration for the deed of sale in the event of its being disputed. In this view the fact of the bond being produced by Rammohun at the time of the application for mutation of names before the Collector may be fairly accounted for, especially as, until the completion of that mutation, the transaction which the deed of sale was intended to effect could scarcely be considered complete. Such precaution on the part of Rammohun is shown to have been in some degree necessary, because, as it turned out, the Rajah, denying that deed of sale, objected to the mutation of names, and it was then, in order to meet that objection, that Rammohun produced the bond before the Collector. We think that all the above circumstances are entitled to consideration, and that the retention of the bond under the state of facts is not sufficient to induce us to believe that the deed of sale was a forgery.

The Principal Sudder Ameen states, in his judgment in the Court below, that, if the deed of sale were genuine, it of itself satisfied the decree, No. 102, on account of which attachment was then pending, and there was no reason why the execution should have been proceeded with; but here we must look to the dates, and in so doing we find that the application for the execution of the decree was made and duly granted previously to the execution of the deed of sale, for the application for execution was made in December, and the deed of sale is alleged to have been executed in January following. It is stated, too, that the sale might have been stayed. We find that it was first fixed for the 2nd February; then for the 2nd June; but, intermediately, the Rajah had disputed the defendant's right to mutation of names, and then the defendant had no occasion to stay the sale.

The Principal Sudder Ameen further remarked that the bond of Cheyt 1261 was not due till Cheyt 1263, and that there was no necessity, at the time at which the deed purports to have been executed, for the Rajah to raise money to satisfy the bond by a sale of the property. Upon this point we may observe that, if the bond and deed of sale were forged, the parties contriving the fraud would probably so have arranged the dates in their forgeries as to leave no room for cavil upon such an incongruity as this.

Further, it is stated that there was no such pressure, from want of money or from money-claims against the Rajah, as to require him to execute a deed of conveyance making over a portion of his landed property to Rammohun, defendant. But it was proved that a sum of Rupees 700 was urgently required to meet Government demands for revenue, and that that sum was really advanced by defendant for this purpose. At the same time we see that four money-decrees had actually passed against the Rajah, in one of which, *viz.* No. 102, process of attachment was actually pending upon the property. Money also must have been required in order to stay execution with respect to those decrees which had been obtained but not executed by Rammohun. Now, under such circumstances, is it unreasonable to expect that Rammohun, acting under the dictates of ordinary prudence, would have made a further advance

without requiring from the Rajah some better security for the debts and unsatisfied decrees than he then had? It is further to be observed that the order of the Board of Revenue for the mutation of names in Rammohun's favor was dated the 9th of March 1858. Under that order the Rajah was in fact dispossessed, yet he did not sue to set it aside for three years afterwards. Another point to which the Principal Sudder Ameen refers in his judgment relates to the purchase of the stamp and the writing of the deed by Joykisto, a servant of the Rajah. The Principal Sudder Ameen says that the defendant, Rammohun, would not be likely to accept a document prepared by his own relative, nor the Rajah to have had one prepared by his own servant. But we do not see sufficient force in the argument to induce us to come to the conclusion that the deed was a forgery. We have to decide whether Rammohun and Joykisto have, in collusion, forged the deed, and have also succeeded in causing the Rajah's own mooktear to join in that collusion, and to take, as his share in the proceedings, the part of presenting a false petition with a view fraudulently to obtain a mutation of names under a forged deed.

Now, what have we got to support this allegation of conspiracy and forgery, and what to contradict it? We find little or nothing to support it; whereas, on the other hand, we have the following strong facts to contradict it:—

We have Joykisto coming forward in person and verifying his written statement, whereas the Rajah has not, from first to last, denied the execution of the deed in such a manner as to render himself amenable to the Criminal Courts of the country if it were really executed by him. The bank-notes alleged to have been advanced by Rammohun, as the consideration of the conveyance, have been traced into the possession of Government on account of the revenue due from the Rajah, and those advanced by him in part of the consideration for the bond of Cheyt 1262 were traced into the hands of Seetaram Hossein in discharge of a debt due from the Rajah to him. Further, the Rajah offered in the Court below, and has repeated his offer in this Court, that, if Rammohun would come and depose in Court, he, the Rajah, would be bound by his statement. But the Rajah has charged the defendant with conspiracy and forgery. It is within his own knowledge whether he executed the deed or not. Joykisto has already verified his written statement, which alleges that the deed was executed by the Rajah. He is liable to be punished for giving false evidence if the statement is untrue. It would have been more satisfactory if the Rajah had tendered his own evidence, instead of offering to be bound by the statement of Rammohun if he would come into Court and give evidence. We are quite aware of the prejudice which many natives have against giving evidence in a Court of Justice. Rammohun Mookerjee is a brahmin, and probably has as strong a prejudice in this respect as the Rajah, and possibly the knowledge of this by the Rajah may have induced him to make the offer to which we have referred. *The Rajah, who makes the charge of forgery and conspiracy, should have first come and given his evidence, especially as the matter was one within his own knowledge.* Rammohun does not profess to have been present when the Rajah executed the deed: Joykisto has verified his statement that it was executed. We thought that the Rajah's prejudice might possibly have been the cause of his not giving his evidence in the Court below, and we postponed the case in order that the Rajah might come before us, and deny the execution of the deed if he could, and we also gave the defendants, Rammohun and Joykisto, liberty to attend at the same time. We intimated that the Rajah ought to give his own evidence before we called upon Rammohun and Joykisto to give theirs.

The Rajah has not appeared, nor has any explanation been given for his non-appearance. The defendant, Rammohun, as certified by Dr. Macrae, is at Sulkeah, but quite unable to come to Court: the defendant, Joykisto, is present in Court. Now it is the Rajah who has brought this suit. He not only repudiates the deed, but, if his case is true, the defendant and others must have been guilty of conspiracy, forgery, perjury, and fraud. It was the Rajah's own case, and therefore we did not think it necessary to order his attendance, nor is it necessary to compel it. We simply gave him the opportunity of giving his own evidence if he wished to do so, and the defendants were allowed to give their evidence if they should find it necessary. We are told that persons of the Rajah's station in life in this country have a prejudice against appearing and deposing in a Court of Justice. If the prejudice is the cause of the Rajah's non-attendance, the Court can only regret it for his own sake, and for the cause of justice if his case is a true one. But he must not expect the Court to find that his charge against the defendants of forgery and conspiracy is a true one upon the evidence of menials, when he refuses to give his own evidence upon a matter within his own knowledge. It is not the wish of the Court to disregard honest prejudices however erroneous. But they cannot allow such prejudices to interfere with the due administration of justice. *If parties will not come forward and give their own evidence in cases in which such evidence is most important and the best that can be obtained, they must not complain if their written statement, verified by their mookhtear and not by themselves, and supported by the evidence of menials and a class of witnesses of whom any number can be obtained to prove any fact that is wanted, is not believed. The Court will require the best evidence to be given, and will not be satisfied with the evidence of inferior witnesses put forward by the parties themselves, while they remain in the background and plead their prejudices as an excuse for their absence.* As this rule comes to be more generally acted upon, fewer false causes will be put forward, and the occupation of hired witnesses be gone. Looking at all the circumstances, we are of opinion that the Rajah has not made out his case. The appeal must therefore be decreed, and the suit of

the plaintiff, Rajah Nursing Deb, must be dismissed, and the Rajah must pay the costs of the defendants in the lower Court, and the costs of this appeal, with interest on such costs at 12 per cent. per annum from this date to the time of realization.

The 11th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Hindoo law—Suit for moiety of joint inheritance—Onus probandi.

Case No. 22 of 1862.

Regular Appeal from a decision of Mr. R. H. Russell, Judge of Tipperah, dated the 15th March 1861.

Musst. Soobheddur Dossee, Pauper (Plaintiff) *Appellant,*

versus

Boloram Dewan and others (Defendants) *Respondents.*

Baboos Chunder Kally Ghose and *Romanauth Bose* for Appellant.

Baboo Dwarkanauth Mitter for Respondents.

Suit laid at Co.'s Rupees 18,691-6-6.

Where a party sues for a moiety of certain property on the ground that it is joint property, the onus is on him to prove that the property is joint, failing which his suit is liable to be dismissed.

THIS suit was brought by the plaintiff in *formâ pauperis* to recover the sum of Rupees 2,172, the value of certain moveables, and Rupees 16,519-6-6, alleged to have been put out by defendants on loan; the two sums amounting together to Rupees 18,691-6-6. The plaintiff is the widow of Sreeram, deceased, and the principal defendant, Boloram, was the brother of Sreeram.

The plaintiff alleges that her deceased husband, Sreeram, and the principal defendant lived in commensality, and that their treasure and business transactions were kept and carried on in common; that, during her husband's life-time, and subsequently to his death, loans were made out of the joint funds; that bonds were taken partly in the name of the plaintiff's husband and partly in the name of defendant and his wife and other parties; and that after the death of her husband, and whilst the plaintiff and the principal defendant lived in joint mess, the latter and his wife, colluding with the debtors, renewed the bonds which had been given for monies advanced out of the joint funds, and took her bonds for the same and dispossessed her of the chittahs of her husband: that the sum of Rupees 18,072-12-7 for principal, and Rupees 7,321 for interest thereon, were due by the Maharajah of Tipperah on one of such bonds; the sum of Rupees 4,000 and interest by Tulvristo Thakoor; the sum of Rupees 1,000 principal, and Rupees 300 interest, by Gungachurn. The plaintiff claimed half of the above amounts as belonging to her as the widow of Sreeram, and also the value of one-half of certain moveable property, estimated at Rupees 4,344, alleged to have been purchased by defendant with part of the joint property. One issue, and the only important one in this appeal, was *whether* Sreeram and Boloram, the principal defendant, *carried on business with their joint funds whilst living in commensality*; whether the bonds in question were executed and renewed for and the effects enumerated in the plaint purchased with the joint funds of both; and whether the plaintiff was entitled to recover a moiety of the considerations in question.

The Judge found that issue in favor of the defendant, and the judgment which he delivered very clearly stated his reasons for coming to that conclusion. We entirely concur with him. It is clear that no part of the property was ancestorial; the whole was self-acquired, and, as remarked by the Judge, Boloram, who was dewan of the Maharajah of Tipperah, was in a position to acquire a larger amount of property than his brother, who was merely a peon and afterwards a jemadar. No evidence was given to show that the brothers treated their separate acquisitions as joint property, and not a single bond or other security given to the brothers in their joint names was produced. On the contrary, it was stated in evidence, although the bonds were not produced, that the new bond given by the Maharajah of Tipperah included the bonds given in Sreeram's name. These may have been his separate property; and if the defendant, Boloram, had no authority to deliver them up and to renew them in his own name, the plaintiff may be entitled to recover them from the Maharajah, or to recover the amount of them from the defendant, Boloram, when the renewed bond is paid off. It is unnecessary to determine that question in this suit, and we are not in a position to do so. This suit was brought upon the ground that the whole property was joint property, and that the plaintiff was entitled to one moiety of it; and not upon the ground that a portion of the consideration for the new bond given by the Maharajah consisted of two old bonds which were the separate property of the plaintiff's deceased husband.

The Judge was right in stating that the plaintiff was not entitled to recover the moiety claimed by her, and that was the only point which he was compelled to decide in that case.

It was contended that, as the two brothers lived in commensality, the presumption was that their property was joint. *The rule is correctly laid down in the cases cited* in the judgment of the Court below, *viz.*, Kishoree, appellant, S. D. A. Rep. February, 1852, page 111, Kallee-persad Roy *vs.* Degumber Roy and others, Cases 52 and 54 of 1819 (vol. ii. page 237, Macnaghten's Hindoo law). Applying that rule to the present case, the Judge held very properly that the *onus* lay upon the plaintiff; and there being no sufficient proof on her part that the funds were joint, he was quite right in dismissing the suit. The appeal, therefore, must be dismissed; it will, however, be dismissed, without costs.

The 11th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Jurisdiction (of Collector)—Suit for rent—Benamee.

Case No. 61 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. P. G. E. Taylor, Judge of Burdwan, dated the 21st November 1861, affirming a decree of Baboo Doorga Persad Ghose, Deputy Collector of that District, dated the 1st May 1860.

Heeraloll Bukshee (Defendant) *Appellant*,

versus

Rajkishore Mozoomdar and others (Plaintiffs) *Respondents*.

Baboos Kally Prosono Dutt, Unnoda Persad Banerjee, and Dwarkanauth Mitter for Appellant.

Baboo Bungsheebuddun Mitter for Respondents.

A suit for rent against two persons, one as the benamee, and the other as the actual farmer, is cognizable by the Revenue Court under Clause 4 Section 23 Act X of 1859. In such a suit the plaintiff can only obtain a decree against one or other, not both, of the defendants.

This was a suit brought to recover Rupees 2,790-15-5, due for the rent of the Mullickpore putnee mehal from 1257 to 1261. The suit was brought against Heeraloll Bukshee, the special appellant, and the heiress of Roopchand Roy, jointly. The izara was taken in the name of Roopchand Roy. Heeraloll Bukshee was made a co-defendant upon the ground that the izara was benamee and that he was the real proprietor. The Deputy Collector gave a decree for the plaintiff against both defendants for Rupees 778-11-11. The defendant (Heeraloll Bukshee) above appealed to the Judge, Mr. C. Buckland, who, finding no proof that the izara was benamee, reversed the decree and dismissed the plaintiff's claim. The plaintiff applied for a review of judgment. The main grounds of the application were, *first*, that, as Heeraloll only had appealed, the Judge could not dismiss the suit altogether, and that the decree ought to have been given against the heirs of Roopchand; *secondly*, that Heeraloll was proved to be the actual farmer who was in possession of the state when the balances accrued, and that he was therefore jointly liable with his *furzee* Roopchand. In the judgment from which the appeal is preferred the Judge says:—"The Court, on perceiving that the first ground was a good and sufficient reason for the review, admitted the petition for it, but with the declared intention of revising the entire judgment if found to be otherwise erroneous to the extent alleged in the appeal. The case came on to be heard in review before Mr. P. Taylor, the Judge, who held that the izara was benamee and that the appellant was the actual farmer and possessor of Mullickpore in the years of balance. He consequently set aside Mr. Buckland's judgment, dismissed the appeal, and confirmed the decision of the Deputy Collector, with all costs of both Courts including those of review."

It is now contended, *firstly*, that the question, whether the lands were held *benamee or not*, could not be properly adjudicated *under Act X of* 1859, and that the lease having been given to one person, the landlord could not fix the liability on another without going to the Civil Court; *secondly*, that the Judge, having admitted the review on a particular point, could not re-open the case except upon that point.

As to the first ground, we are of opinion that this was a *suit for rent* and was *properly* brought *under* Clause 4 Section 23 of *Act X of* 1859. It was not the less a suit for rent because the question raised was whether Heeraloll was liable for it or not. In determining that question it was necessary to try whether Heeraloll was the real proprietor and whether Roopchand was merely his agent or not. The Judge had power to determine that question, and has found that the izara was benamee and that Heeraloll was the actual farmer and the person beneficially interested in it. That being so, we are of opinion that Heeraloll, as the real proprietor, was liable for the arrears of rent. It is a general rule of English law that, when an agent enters into a contract in his own name as principal without disclosing the fact that he is acting merely as agent, the principal, when discovered, is liable to be sued upon the contract. But the principal is not liable upon the contract of his agent if the other party to the contract, with full knowledge of the facts, and having the power and means of deciding to whom he will give credit elects to give credit to the *agent* in his individual character. This rule is founded on principles of justice, and is applicable as well in this country as in England It may well be imagined by the person with whom a contract is made that he who derives the benefit of it will also be able to perform it on his part.

In the present case the izara might have been granted under the belief that Roopchand, by collecting the rents from the ryots, would obtain the means of paying his own rent, whereas, if Heeraloll were to have all the benefit of the collections from the ryots, and if Roopchand were the only person liable to pay the rent due under the izara, the plaintiff might have to look in vain for the payment of his rent. As no evidence was given to show that the plaintiff knew that the izara was taken in the name of Roopchand as *the furzee* (fictitiously) for Heeraloll, and the Judge has not found that such was the case, the plaintiff has the right to look to Heeraloll for payment; but he was bound to make his election, and *could not sue both* for the same rent. Having sued Heeraloll, he has a right to recover against him, but not against the heirs of Roopchand also. The Judge was right, upon the facts found by him, in confirming the decision of the Deputy Collector against Heeraloll.

We also think that the Judge was right in holding that he could go into the whole case upon review. The Judge states that the review was admitted with the declared intention of revising the whole judgment and the order for review

says that the decision of the Judge in review must, so far as Heeraloll is concerned, be upheld. The decision of the Deputy Collector must be affirmed as against him, with all costs of both the lower Courts including those of the review; but the suit must be dismissed as against the heir of Roopchand. As the heir of Roopchand has not appealed, we do not think it necessary to award him any costs.

The probability is, that no costs have been actually incurred by him; that Heeraloll has really defended the case for both parties; and the whole costs of the defence have been borne by him. Heeraloll must pay the costs of this appeal, with interest at 12 per cent. from this date to the time of realization.

The 11th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Enhancement of rent—Fair and equitable rate (Mode of determining).

Case No. 89 of 1862.

Special Appeal from a decision of Mr. F. B. Kemp, Judge of Jessore, dated the 8th November 1861, *reversing a decree of Baboo Eshan Chunder Mozoomdar, Deputy Collector of that District, dated the 29th June* 1861.

Mr. Robert Savi (Plaintiff) *Appellant,*

versus

Jeetoo Meeah and others (Defendants) *Respondents.*

Mr. R. T. Allan for Appellant.

Boboo Dwarkanauth Mitter for Respondents.

In a suit for enhancement of rent on the ground that the value of the produce of the land has increased, the Court should determine whether the rent is fair and equitable with reference to the increase in the value of the produce, and not merely decide that the old rent is fair and equitable because there has been an increase in the wages of labor and the necessaries of life.

In this case one of the principal questions was whether the rent was liable to enhancement.

The Judge observes that the plaintiff, to succeed, must very clearly show that the jummas of the defendants are liable to enhancement on one of the three grounds laid down in Section 17 of Act X of 1855. As to the first and third grounds, he decided against the plaintiff. The decision as to those grounds depended entirely upon questions of fact, and the decision of the Judge is consequently conclusive.

As to the second ground, the Judge also determined against the plaintiff, and consequently the suit was dismissed. The question is, whether the Judge was right as to that ground. He says:—"It is true the price of rice has risen, but it is equally true that the wages of labor are double what they were. This is admitted even by the plaintiff's witnesses. Again, the price of the necessaries of a ryot, such as salt, tobacco, mustard oil, has greatly risen the price of the last-named article is double what it was. I am therefore of opinion that the value of the produce of land in this instance had not increased to an extent to warrant an enhancement of the rent on that ground." The Judge has not simply determined that the existing rent is fair and equitable, or that the value of the produce has not increased to an extent to warrant an enhancement of the rent; but he has given his reasons for coming to that conclusion. In determining the question whether the present rent is fair and equitable, the Judge would have been right in taking into consideration the rise in wages; but it does not necessarily follow that, because wages are double what they were and the necessaries of life have risen, the old rent is fair and equitable under the altered state of circumstances. We have lately decided this question in the case of Special Appeal No. 1607 of 1862, in which we have laid down the principle applicable to this class of cases. This case must, therefore, be remanded, in order that the question may be determined whether the present rent is *fair and equitable. having reference to the increase in the value of the produce of the lands;* and, if not fair and equitable, what is a fair and equitable rate. We observe that it is alleged that the jumma is not one joint jumma, but that it consists of three separate jummas. If this is so, we think that the lower Court, if it determines that the jumma is not fair and equitable, should specify to what extent each or any of the other separate jummas which form the aggregate amount ought to be enhanced to render it fair and equitable.

The 11th November 1862.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Suit to contest notice of enhancement.

Case No. 240 of 1862.

Special Appeal from a decision of Mr. A. E. Russell, Judge of Moorshedabad, dated the 22nd November 1861, *reversing a decree of Baboo Koonjloll Banerjee, Deputy Collector of that District, dated the 31st July* 1861.

Gunga Persad Singh (Plaintiff) *Appellant,*

versus

Ramloll Singh and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboos Dwarkanauth Mitter and *Sreenauth Doss* for Respondents.

In a suit to contest a notice of enhancement on the allegation of a holding under an istemraree pottah, if the plaintiff fails to prove such a holding, the Judge need not try whether the ground of enhancement existed, or whether the rate of enhancement was fair.

This was a suit for reversal of notice of

enhancement and for obtaining an istemraree pottah. The notice was to enhance upon the grounds mentioned in Clauses 2 and 3 Section 17 Act X of 1859. The plaintiff contended that he was not liable to enhancement, and that he held under an istemraree pottah; and he alleged that he had held for 48 years at a fixed rent, which gave him a right to hold at that rate under Sections 3 and 4 of Act X of 1859. The Judge decided that he had not held either at a fixed jote or at a fixed jumma. It is now contended that the Judge ought to have tried whether the ground for enhancement specified in the notice existed, and what was a fair amount of rent; and that, as there was no evidence upon those points, the Judge ought to have decided in favor of the defendants. But this suit was brought to resist the notice altogether upon the ground that the plaintiff was not liable to enhancement, and not to try whether the ground of enhancement existed or whether the rate of enhancement was fair. The plaintiff, therefore, would not come prepared with evidence upon the other points. The Judge was right in not going into them in this suit, and leaving them to be decided in a suit for excessive demand of rent or in a suit for arrears of rent. The appeal must be dismissed, with costs and interest upon such costs at 12 per cent. until the time of the realization thereof.

The 29th November 1862.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr, and L. S. Jackson, *Judges.*

Suit by Wife against Husband—Onus probandi—Abuse of trust (by Husband)—Interest.

Regular Appeals from decisions of Mr. E. Lautour, Judge of the 24-*Pergunnahs, dated the* 25*th July* 1859.

Case No. 20 of 1860.

Moonshee Buzzul Ruhim (Defendant) *Appellant,*

versus

Shumsheroon-nissa Begum (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Moonshee Ameer Ally* for Appellant.

Baboos Kishen Kishore Ghose, Shumboonauth Pundit, and *Dwarkanauth Mitter* for Respondent.

Case No. 174 of 1860.

Mirtunjoy Bose (Defendant) *Appellant,*

versus

Shumsheroon-nissa Begum (Plaintiff) *Respondent.*

Baboo Jugdanund Mookerjee for Appellant.

Baboos Shumboonauth Pundit, Kishen Kishore Ghose, and *Dwarkanauth Mitter* for Respondent.

Case No. 175 of 1860.

Judoonauth Bose (Defendant) *Appellant,*

versus

Shumsheroon-nissa Begum (Plaintiff) *Respondent.*

Mr. R. T. Allan, Baboo Jugdanund Mookerjee, and *Moonshee Ameer Ally,* for Appellant.

Baboos Shumboonauth Pundit, Kishen Kishore Ghose, and *Dwarkanauth Mitter* for Respondent.

Suit laid at Co.'s Rupees 5,00,251.

Suit by wife to recover valuable real and personal property of which she has been fraudulently and violently deprived by her husband, the principal defendant. The defence was *bonâ fide* sale and payment of consideration money. Held that the *onus probandi* was on the defendant; and that the mere endorsement of Government securities (which, in the case of strangers or third parties, would throw the onus on the person alleging fraud) did not apply when the relation was that of husband and wife. A trustee who misapplies trust funds should be compelled to compensate the *cestui-que* trust and is liable to heavy interest.

The plaintiff is the daughter of Moonshee Hossein Ally, and the wife of the defendant, Buzzul Ruhim; and she sues to obtain recovery of her real and personal estate, of which she has been deprived by a series of acts of fraud and violence on the part of her husband. Her allegations are as follows:—Her father died on the 1st of Kartick 1244, leaving three wives* and one nephew Boo Ally, as heirs of his estate, which was valued at seven lakhs of Rupees. After her father's death, there was born of him a posthumous child, Nuggoon-nissa, by his wife Kumiroon-nissa, the mother of the plaintiff. The nephew, Boo Ally, sued the other heirs for his share in the property; but eventually the suit was compromised, and the widows were allowed to retain a certain amount of the money and to reside in certain houses respectively. By this arrangement, under the Mahomedan law the plaintiff became entitled to 8-24ths of the property as her own right, and to 8-24ths in right of her sister, the posthumous child of her father, who died when about 12 or 13 years of age. The plaintiff, not being at first a party to the suit instituted by the nephew, did afterwards apply to become, and was made, a party; and after divers acts of litigation against her mother Ashruffoon-nissa, and one Mahomed Waris, the manager of the estate, matters finally resulted in a further compromise by which her mother retained a portion of the cash, equipages, and dwelling-houses of the deceased, the particulars of which it is not necessary to detail here.

The plaintiff then continued in the peaceable enjoyment of the property allotted to her by the compromise, with the exception of the reversionary interest in the property allotted to her mother. Plaintiff's first husband, Moulvie Rukumooddeen, died on the 19th of Kartick 1253, or in November 1846, leaving his widow with two sons and three daughters; and in the month of Bysack 1254, or on or about the 27th of April 1847, she

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* Ashruffoon-nissa, [illegible]datoon-nissa, and Kumiroon-nissa.

was married to the defendant, Buzzul, by the ceremony of *nikah*, he settling on her a lakh of Rupees and 5,000 goldmohurs.

For the first three or four months after her marriage she resided in her own house, but was then prevailed upon by her husband to remove to his own residence, which she accordingly did, taking with her all her Government papers, her cash, jewels, utensils, and house-hold furniture of every description. The Government papers, cash, jewels, gold-mohurs, and Bank of Bengal notes were locked up by the plaintiff who retained the keys; but she subsequently made over 1,26,800 Rs. in Government securities to the defendant to enable him to draw the interest thereon on her behalf.

On the 15th of Bhadro 1256, or in August 1849, her sister Nuggoon-nissa died, and the plaintiff had again to institute two suits for the property which devolved on her as heir to the deceased. In the pendency of the suits her mother died on the 20th of Phalgoon 1258, and the plaintiff, thus becoming the sole heir to her mother and sister, obtained a certificate of administration under Act XX of 1841, and compromised matters with the remaining litigants by paying Rupees 30,000 to one Mirza Ahmed, whereupon she obtained Company's securities to the amount of Rupees 1,14,500, and cash to the amount of Rupees, 13,822 in right of her sister, and other articles, which were all brought to the defendant's house.

The defendant had the custody of the securities and of the signet of the plaintiff. The other articles were locked up by the plaintiff herself. Her husband then proceeded on a tour, and the plaintiff, in his absence, discovered that he was deeply indebted, and she had reason to believe that he had made away with her Government paper, treating it as his own.

On his return home she taxed him with this misappropriation when he put her off with divers excuses: eventually the quarrel increased, high words passed, and her husband having placed her in confinement and treated her with great cruelty, she claimed the protection of the Magistrate through her son-in-law, and by that official was released from confinement on the 25th December 1855, on which day she was sent forth from the defendant's house without her jewels, cash, Government paper, or property of any kind, except the mere clothes on her back.

Her suit is accordingly brought for the recovery of all properties, real and personal, as detailed in the plaint; and also for the title-deeds to a house and a garden in Sealdah in which she resides, which title-deeds have been, and are still, unlawfully detained by the defendant. The gist of her claim for redress is that the Government securities, amounting in all to 2,34,800 siccas, were fraudulently sold by the defendant, and the proceeds appropriated to his own use; that certain of her lands and houses at Dum-Dum and elsewhere have been fictitiously sold by the defendant and purchased for himself in the names of his dependents; and that the remainder of the valuable personal property taken by the plaintiff to the defendant's house, when she went to reside there, has been either made away with or is unlawfully detained by him.

The answer of the chief defendant, Buzzul Ruhim, is, that the lands at Dum-Dum and elsewhere were sold *bonâ fide* by the plaintiff and purchased by third parties for a valuable consideration; that the plaintiff's securities were sold with her knowledge and consent by the defendant; and that the plaintiff has, in Court, admitted a sale of Rupees 23,000 of paper in this way; that the paper was parted with to pay the plaintiff's own debts and to provide her necessary expences; and that she received from the defendant a valuable consideration for the same; that the defendant never had the plaintiff's signet in his custody; that he has no title-deeds belonging to the plaintiff in his keeping; that her dowry was only Rupees 15,000; that, instead of having brought to his house valuable property to the amount of Rupees 16,900, she brought nothing but few ornaments of little worth and some gold and silver plates which she privately removed; and that he has never exercised any act of oppression towards her, nor has he confined or treated her with cruelty.

The other defendants, separate appellants, support these allegations as far as their own conduct is concerned.

The Judge, in a very full and carefully considered judgment, has decreed the plaintiff her claims to the lands and gardens and to the Government securities in full, directing the defendant to pay the same amount of Company's paper as was held by him for plaintiff into Court within one month, or to pay in cash for the notes at par. But the Judge has cut down the claim for valuable personal property to Rupees 20,511-5-2-3 and has given interest from the date of suit only.

Against this decision the defendant Buzzul Ruhim appeals on the merits of the case.

Mirtunjoy appeals for his costs, inasmuch as a certain garden, sold for arrears of revenue and purchased by him, has not been included by the plaintiff in her claim.

Judoonath Bose appeals against that part of the decision which declares the sale of real properties to him to be fictitious, and maintains their validity.

And the plaintiff, under the new Code, takes exception to the deductions on her claims made by the Judge, and to the date and rate of interest allowed to her, as well as to the appeal of Mirtunjoy, and claims thereon to re-open that part of the case on its merits.

We propose to consider all these appeals together, and to take first the whole case as between the plaintiff and her husband.

In this part of the enquiry the first matter which calls for decision is the claim of the plaintiff to a large amount of jewels, cash, furniture, and other properties, which, in the strictest sense of the word, are personal, and which the plaintiff asserts herself to have removed to the house of the defendant three or four months after mar-

riage. The plaintiff here takes objection, on the appeal of the defendant, to that part of the Judge's decision which allots to her only Rupees 20,511, and she claims the larger sum of Rupees 1,67,000; and the defendant contends that this part of the Judge's decision, on the contrary, rests on no trustworthy evidence. The plaintiff, we find, admitted, in the lower Court, that there was no evidence for the items of 26,978 in goldmohurs, of 16,688 in cash, or of 9,000 in bank notes; and we now find that she has no other evidence to support the remainder of her claim to this sort of property, valued at Rupees 1,16,568, than the evidence of witnesses named in the margin, which the Judge has discredited. Their statements are far too vague and general for a Court to place reliance thereon; and some of them do not pretend to trace the property, which they ascribe in such general terms and estimate so largely, up to the possession of the defendants. We may safely lay it down that, in claims of this kind, so easily magnified or even so capable of being put forth without any real basis, we must have the clearest proof, and we must look for witnesses who can speak with precision and distinctness to the kind of valuables possessed, and who can satisfy us that they had good opportunities of knowing whence the articles were derived and in what condition they passed, as alleged, into the possession of the defendant. Some of the witnesses speak to an amount of furniture and valuables as possessed by the plaintiff in her own house, and others mention that carts and coolies were employed for a whole day in transporting the same, and say that a list thereof was drawn out when the plaintiff went to reside with the defendant; but no attempt has been made to get at this list by calling on the defendant to produce it, and the only evidence appears to us, as it unquestionably did to the Judge of the lower Court, to be quite unsafe as a guide in this portion of the claim.

1st Mahomed Waris; 2nd Gholam Arab; 3rd Gholam Ruhoman; and 4th Mahtab Dye.

For the amount decreed on this head, the Judge, while admitting the difficulty of the case and the great exaggeration of the claim, has taken as his basis a list drawn up in 1839 by certain persons appointed to report on the estate of the plaintiff, and of her minor sister after the death of their father. Of this list the Judge rejects items Nos. 2, 3, 4, and 5, and decrees to her the items No. 1, and Nos. 6 to 31, inclusive, stating the whole amount at Rupees 20,511, in the proportion of 11, 067 as the plaintiff's share and of 9,444 as that of her sister. But we think that the partition or list of 1839, drawn up before the first marriage of the plaintiff, is a still more unsafe ground than the regular depositions of the witnesses whereon to decree a claim for property which it is not pretended ever reached the house of the defendant until 1847, or 8 years afterwards; and we cannot assume, as the lower Court appears to have done, that replacement must have ensued to meet wear and tear, or that this amount can fairly be regarded as even an approximate estimate of what the plaintiff still possessed during the time when she resided with the defendant.

It is true that there is good evidence to show that she left the house of the defendant on the 25th December 1835 with only the clothes on her back, though the Judge rightly discredits the allegations of barbarous treatment or of rigorous confinement; while, if we hold the defendant to be the wrong-doer, or to have neglected to rebut any presumption which could arise against him on any fair *primâ facie* evidence to the possession of personalty on the part of the plaintiff, we might cast him in the full amount claimed by the plaintiff, or we might assess reasonable damages just as a jury might assess them. But, for this end, there should be some reliable basis to show that the plaintiff was possessed of some such valuable property and took the same with her when she went to live with the defendant: and, thus, looking to the character of the oral evidence, which we reject equally with the Judge, as well as to the list of 1839 which our previous remarks have disposed of, we are constrained to say that there is no evidence left us at all; and we cannot, from considering the garden and the Company's securities shown to have been the inheritance of the plaintiff, undertake to fix what ought to be, or might be, the amount of jewels or other personalty in the possession of a Mahomedan lady of the position and fortune of the plaintiff.

In fact, the only good evidence on such a point was that of the plaintiff herself, and looking to that spirit which she has evinced all her life whenever her rights have been invaded, and to the circumstances of her ejectment as described by herself, we see no reason why she should not have tendered her own deposition; nor can we in her case allow any weight to the repugnance to give evidence, so constantly put forward by native ladies as an excuse for not appearing in Court.

On these grounds, we not only reject the plaintiff's appeal for the additional property, but we hold, on the appeal of the defendant, that the decree of the lower Court must be here amended, and the sum of Rupees 20,511 be deducted from the amount decreed.

The next point for our consideration is the claim of the plaintiff to the Government securities disposed of by the defendants, or to their equivalent in cash.

The amount of these securities held by the plaintiff at the time of her marriage and when she went to reside with the defendant was Rupees 1,03,800; subsequently, on the death of her sister, she became possessed, on the 30th July 1853, of further securities to the amount of 1,14,500; the total amounted to 2,34,800 siccas.

These securities, when enquired for, was declared by the defendant to have been disposed of in the following manner:—On the 21st of May 1848, paper, to the amount of Rupees 16,500, being two pieces of 9,500 and 7,000 respectively, were conveyed to the defendant by endorsement;

and on the 27th of the same month seven pieces of paper, aggregating Rupees 92,500; all of this being of the four per-cent. loan, except one of five per cent. to the value of Rupees 4,000, were similarly endorsed.

About a month or six weeks afterwards Rupees 82,000 of the proceeds of this amount were made over to Baboo Aushootosh Deb in payment of a debt due to him by the defendant. This obviously leaves a considerable sum still unaccounted for.

As regards the securities which devolved on the plaintiff as heir of her sister, it is contended for the plaintiff that, on the 30th of July 1853, she received them from the office of Receiver of the Supreme Court, and it is also alleged by the plaintiff that she made them over to the defendant on the same day. This the defendant denies, his version being that, on the 2nd of March 1855, Rupees 32,500 of this amount, and on the 2nd July of the same year the remainder of the above securities, were endorsed to him by the plaintiff by way of sale; of this amount he declares that he still has Rupees 83.000 unsold. The remainder was sold in the bazar under circumstances of which there is before us no record. About Rupees 32,000 were evidently got rid of in this way, and there is an entry to this effect in the defendant's khatta. We hold here, on the argument adduced for both parties, that the *onus* of proving the *bona fides* of these sales—the knowledge and consent of the plaintiff and the payment of a consideration—lies fairly on the defendant. A mere endorsement of the paper, which, in the case of strangers or third parties, would throw the *onus* on the person alleging fraud, will not support this argument when the relation is that of husband and wife. It would be unreasonable and unfair in this instance to expect the plaintiff to prove a negative. The evidence to the sale is, then, that of the witnesses, Asrooddeen, Mahomed Wazir, Keylas Chunder Bose, Tarucknauth, and of the defendant himself; and it is also urged for the defendant, that the plaintiff herself, in a separate suit before the Civil Court, has admitted the loan of a certain portion of Government securities to the defendant. It appears that Ashruffoon-nissa, a wife of the deceased Hossein Ally, being a judgment-creditor, attached the plaintiff's property, whereupon the defendant, her husband, intervened as claiming the same, and subsequently brought a suit to reverse the sale when his intervention was disregarded. But we cannot look on this as a separate and independent act of the plaintiff which she is now estopped from gainsaying, or whereby the Court is precluded from demanding on her behalf the clearest proof of the *bona fides* of the sale of all the securities. We must look into all the circumstances and the relation between the parties, and we are bound to consider chiefly the dependence of the wife on the husband. Now, we observe that, in his answer, the defendant stated that his wife disposed of the securities because she was in want of money and indebted, and that by the proceeds of the sale her debts were cleared off. But in his oral evidence the defendant declares, for the first time, that he required money to pay his large debt to Aushootosh Deb, and consequently paid the plaintiff the value of her securities in cash, disposed of the paper in the market, and then with the proceeds cleared off his own debt. Now, besides the remarkable variation between his first and his second account of this transaction, it appears to us wholly incredible that the defendant should resort to such a roundabout way of satisfying his creditor. If he had cash whereby he could pay his wife, he surely had cash to pay his creditor, and he might have paid the latter with the money in his hands instead of having recourse to the process of purchasing and selling paper at a discount. Moreover, there is much force in the Judge's remarks that, at the very time when the alleged sale of the paper to the husband was put forward in Court to bar execution and to establish a separate right, the fact of the payment of Aushootosh, which would have proved absence of collusion, was carefully kept out of sight, and was not mentioned in the suit to reverse the sale and execution. The inference is irresistible, that the payment to Aushootosh was a transaction to be kept secret from the wife, or was not one to be made in public by the defendant. When asked for his accounts, the defendant and his witnesses produce account-books which they declare are made up afresh every month, and which, therefore, afford no means of tracing the sales in question. Such a statement as to the irregular mode in which books are kept to show the dealings of a Mahomedan of wealth and substance is very unsatisfactory, and compels us to believe that such a practice can only have been resorted to for unfair purposes.

It has been repeatedly urged on us on the evidence that the sales to the defendant are well proved and absolute, and that; as the plaintiff declares that her husband held the paper as her trustee, and impeaches the sale as fraudulent and without her knowledge, she is bound to afford proof of her ignorance of these transactions, which she has not done.

But we have already expressed our opinion that in this case the *onus* of proving the *bona fides* of the sale and payment of the consideration lies fairly on the defendant, and that a mere endorsement cannot settle the question when the relation is so intimate and is one of the dependence, which we must presume to exist, of wife upon husband. And, on the whole evidence so considered, we have not the slightest doubt that the sales are paper sales, kept carefully concealed from the wife, but followed by the disposal of the securities illegally by the defendant, in order to pay his own debts or to provide means for the gratification of his own extravagance.

We have now to consider the mode in which recovery of this portion of the claim shall be decreed, as well as the principles on which interest is to be fixed.

As regards the principle, we observe that with respect to the untouched securities, amounting

to Rupees 82,000, there can be no difficulty. The defendant will make over this paper to the Court within one month from the date of this decree.

With regard to the remainder of the sum, originally amounting to Rupees 2,34,000 sicca, we take the clear rule of equity to be that the Court must compel the defendant to compensate the *cestui-que trust*, and in this instance to place his wife in the same position as if her husband, the trustee, had faithfully performed his duty. In this view we direct that the defendant shall replace all the paper which has been sold, whether the sales can be traced or not, by paper of the amount exactly equal to the deficiency, and bearing the same rate of interest, within one month from the date of this decree. The sum to be replaced will amount in paper to Rupees 1,52,000, or the defendant may have the option of paying into Court a sum of money which would be equal to the purchase of the deficient paper, bearing the same rate of interest as the rate at which each paper can be purchaseable in the market, on the expiry of the period allowed him for making the re-purchase of the paper himself.

If it be objected that the four-per-cent securities, of which nearly the whole of the investments consisted, bear a higher value now than they did on the year and on the various dates when they were unlawfully disposed of, we can only say that the additional sum which will be necessary to replace them must be considered as part of the penalty which the defendant has to pay. The plaintiff has an undoubted right to be placed in the same position, and to enjoy the same advantages from the increased value of her securities, as she would have had, had the fraudulent alienations never taken place.

Then, as regards the principle on which interest should be computed, it is much pressed on us by the Counsel for the appellant that the rate should be, not the Government rate of four or five per cent., but one of twelve per cent., or the highest legal rate. On this point we have referred to Story's Equity of Jurisprudence, chapter 33, page 643, as well as to Smith's Leading Cases in Equity, Robinson *vs.* Pett, page 193. We find that the settled rule in such cases is that, when the trustee has employed the trust funds in a trade or adventure of his own, or has applied the proceeds, after sale of stock, to his own use, or has otherwise conducted himself fraudulently, a Court is justified in saddling him with a heavy interest, the principle being that the Court must take care that the fraudulent trustee shall not derive any profit from his abuse of trust.

We find, however, that the plaintiff, in bringing her suit, has expressly limited her claim to interest at four per cent., or the rate derivable from her securities; and, whatever we may think of the conduct of the defendant, or however we might be justified, under other circumstances, in decreeing a higher rate with advertence to the above principle, we cannot suffer the plaintiff, at this stage, to go beyond the limits of her express claim.

But we decree to her interest at the rate which her securities bore, according as they were four or five per cent., from the date of the last receipt by her of such interest.

The third and last portion of the property which forms the subject of our enquiry is the real property known as the garden at Dum-Dum, the Mobaruk Bagh at Chingrihatta, and the garden called that of Narayan Mundul. Of these properties, it is contended, the plaintiff has been deprived by the act of the fraudulent Buzzul, in concert with the separate appellants, Judoonauth and Mirtunjoy; and we have postponed this point to consider the validity of these three appeals together.

The circumstances regarding the sale of the garden at Dum-Dum are as follows:—Six shares out of 24 in this garden, being the portions of Boo Ally the nephew of Hossein, and of Ashruffoon-nissa, respectively, were purchased by one Dilras Banoo on the 29th Bysack 1254. Then we have a conveyance of the plaintiff's own share of 8-24ths in this garden to Buzzul on the 12th of Joistee 1255, who conveys the same to the above-mentioned Dilras Banoo on the 1st of Bhadro of the same year; she, in her turn, sells the property to one Jugookhanum on the 22nd of Asarh 1260; and this person, three months afterwards, or on the 12th of Assin 1260, parts with it to Judoonauth, the defendant. As regards the 8-24ths of this garden which devolved on the plaintiff as right of her sister, the transaction is more direct. There is a conveyance of this share of Judoonauth from the plaintiff on the 26th of Pous 1260.

The sales are attested by the witnesses named in the margin, amongst whom is the writer of one of the deeds; and these persons declare that the purchase-money was paid in notes, and that the defendant Judoonauth is in possession. It is further contended in appeal that, when this very property was attached in execution of a decree for Rupees 10,006, held by Ashruffoon-nissa against the plaintiff, the husband, Buzzul, set up this sale from his wife in bar of execution, whereas the Judge held the sale to be collusive; and it is argued that plaintiff cannot take advantage of her own fraud, and claim restitution of the property. But though it is admitted that the defendant at the time endeavoured to stay the execution, we do not think we can assume that the wife was *in pari delicto*. If she ever gave assent to any collusive transfer, advantage must have been taken of her situation, and a Court would be bound to look at all the circumstances, as well as to enquire into the *bona fides* of the purchase and to the payment of a consideration.

Judoonauth Bose, Moomtaz Mahomed, Tufeezooddeen Moonshee, and other ryots.

In fact, we think this is a case similar to that reported at page 1379 of the Sudder Decisions for 1859, in which the Court restored plaintiff to a portion which she had lost owing to the defendant's conduct.

Moreover, against the oral evidence to the sale to, and possession by, Judoonauth, we have the

evidence of the plaintiff's witnesses that the garden is really in the possession of defendant Buzzul, and that Judoonauth is a mere name. And we have further to consider the extreme improbabilities apparent on the very face of the conveyances. We have no knowledge of either Dilras Banoo, or Jugookhanum, though the latter is stated to be a relative of the Nawab of Chitpore, of their reasons for purchasing or for disposing of the property, or of their ability to pay for the same; nor have we any explanations of the varying prices for which the same gardens sold: the first sale being for Rupees 2,000, the next for 4,000, the third for 6,000, and the last for 4,000. The witnesses to the sales are, or have been, servants of the defendants; and some of them appear to have witnessed two or three of the transactions in the series of changes. Judoonauth, the ostensible purchaser, is admitted to be the treasurer of the defendant, Buzzul, and he purchases the property, for no particular reason, from the wife of his master who is absent on a tour.

The deed of sale to Judoonauth is registered at the office of the pergunnah Kazee, while there is a Registrar of Deeds much nearer at Alipore, not three miles from the residence of Buzzul; and the whole transaction or series of transactions is so ill attested and so evidently improbable, taken with the other disclosures, that we have no hesitation in setting these conveyances aside. The Judge has correctly designated this part of the case as mere circuity of fraud. The plaintiff will be entitled to re-possession of 8-24ths of this garden, with mesne profits to be realized in execution. The Judge has erroneously decreed to the plaintiff 17-24ths of this property, including the 1-24th of Ashruffoon-nissa which was not claimed. The decree will be amended accordingly.

With regard to the sale of Narayun Bagh, the same remarks partly apply. The mother's share in this property was sold to Koylas Bose, the brother of Judoonauth, the latter succeeding to the same on his brother's death. But it is admitted that 8-24ths, being the plaintiff's share in this garden, was sold for her own debts and purchased by Umdatoon-nissa; and there is no evidence to show that the defendant has any beneficial interest in this share, nor any imputation of fraud or collusion regarding it. The decree, then, can be affirmed for 8-24ths held by the plaintiff in her sister's right. We distrust, for the reasons already given, and set aside, the sale of this share by the plaintiff to Judoonauth alleged to have taken place on the 12th of May 1855, or the 30th Bysack 1264. The Judge's decree, which restores 9-24ths including the mother's share of 1-24th, must be amended, and 8-24ths be awarded.

There remains, then, the Mobaruk Bagh at Chingrihatta. The Judge has recorded his opinion that the possession of the appellant Mirtunjoy in this garden is merely nominal; but as the Judge holds that the circumstances by which it passed away from the plaintiff are different, and that there is a legal title in the appellant Mirtunjoy, he has excluded the same from the decree, but has decreed the defendant his costs.

On appeal, to obtain her costs the plaintiff claims the right of opening her whole case thereon under the provisions of Section 348 of the Code of Procedure, and we are of opinion that the words of the Section are so general and comprehensive that we cannot refuse to admit the plaintiff's right to this privilege.

The circumstances of the sale are these:—There is a sale of her own share of 8-16ths or one-half, by the plaintiff to the husband; a default of rent to Government on the second share 8-16ths which the plaintiff held in right of her sister, ensued, and the whole of the shares were then sold, under Regulation VIII of 1835, by Government as zemindar of Dehi Punchanagram. It is argued for the appellant Mirtunjoy that here he has a legal title, regularly acquired at a legal sale without fraud, and that, as the suit is brought for repossession, the sale cannot be cancelled as illegal and irregular.

On the other hand, it is argued for the plaintiff that Mirtunjoy is the dewan or steward of the defendant Buzzul, and that there is good oral evidence to show that the latter has the beneficial interest in the property; and it is pressed on us that as the defendant Buzzul acted and managed for the plaintiff, the failure to pay rent must be presumed to have been intentional, and the purchase by Mirtunjoy at the sale by the Collector was nominal and fictitious as regards the ostensible purchaser, and was one for the real benefit of the husband.

Taking this part of the case with the rest, and looking to the treatment of the wife by the husband and to his disposal of her other valuable property without her consent, we cannot refuse to consider these arguments as valid, or, as a Court of Equity, deny to the plaintiff the relief which she claims; and we therefore decree to the plaintiff the restoration of her rights in the whole of this property, which relief must be effected by the appellant Mirtunjoy executing a conveyance to her of the same; and this piece of relief we accordingly decree.

The appellant Mirtunjoy will, however, only be condemned in his own costs in this appeal, inasmuch as, looking to the peculiar facilities afforded to the plaintiff for re-opening this part of the case, we do not think it right to saddle Mirtunjoy with her costs, which she will accordingly defray herself.

The separate appellants, Buzzul and Judoonauth, are condemned in all the costs in both Courts, and in mesne profits as regards the gardens and real property, to be ascertained in execution of decree.

We are unable to pass any order for the restoration to the plaintiff of the title-deeds claimed by her of the house in which she is now residing, inasmuch as we have no evidence on this particular point.

This disposes of all the three appeals, which all are dismissed: a deduction will be made in the costs of the case for the 1-24th of the share of the mother in the property at Dum-Dum, Narayun Mundul's garden, not claimed originally by the

plaintiff, and in the costs now decreed, as well as for the other deductions ordered by this Court.

The 6th December 1862.

Present:

The Hon'ble C. Steer, J. P. Norman, and W. Morgan, *Judges.*

Order in Execution of Decree (Review of).

Case No. 69 of 1860.

Miscellaneous Appeal from a decision of Mr. A. Pigou, Judge of Moorshedabad, dated the 13th December 1861.

Haradhun Mookerjee, *Petitioner,*

versus

Chunder Mohun Roy, (Decree-holder,) *Opposite party.*

Baboo Kally Kishen Sein for Petitioner.

Baboo Banee Madhub Banerjee for Opposite party.

Held by the majority of the Court (*dissentiente* Morgan, J.) that, under Act VIII of 1859, a Judge has power to review an order passed by him in execution of a decree.

Mr. Justice Steer.—The question raised by Mr. Loch for the decision of a Full Bench is, whether, under the new Code of Civil Procedure, a Judge is empowered to review an order passed by himself in the course of the execution of a decree.

Since Act XXIII of 1861, the Judge has had this power; but the question above refers to the period before the enactment of Act XXIII of 1861.

The 376th Section of the Civil Code, Act VIII of 1859, makes mention certainly of only reviews of judgment in respect to decrees of Courts. But such was the language of Regulation XXVI of 1814, and yet it was always held to authorize a review of orders which are not, strictly speaking, decrees. And, in drawing up the rules of practice at the promulgation of Act VIII, this Court has made distinct provision for applications for reviews of orders passed in Miscellaneous cases, thus showing that, in the mind of the Court, no doubt existed as to the applicability of Section 376 to all orders, and not only to such as may be rightly called decrees.

I think, then, that the question raised for our determination must be answered in the affirmative.

Mr. Justice Morgan.—The Court, in execution of the decree, after having heard and considered the evidence adduced, fixed the amount of mesne profits at 500 Rupees. Some months later, upon the application of some of the parties to the suit, the Court reviewed the first decision and fixed the amount of mesne profits at 3,500 Rupees. I think the Code of Civil Procedure gives no power to any Court to review its decision in such a case, and that no such power is given to the Court by any other law.

Judgments and decrees of the Civil Courts may be revised under the rules contained in the Code applicable to reviews of judgment (*see* Sections 3-376). From orders passed before decree there is no appeal; from orders passed after decree and relating to the execution thereof, there is, or was at the time in question, generally speaking, no appeal (Section 364); but an appeal is given where the order is one regarding the amount of mesne profits (Section 283). It seems to me that the Code clearly expresses in what cases there is a right of appeal, and in what cases there is a power to review; and that the present order is open to appeal, but not to review.

I think, further, that we can look to no law but the Code on this subject, since the Code itself directs the Procedure of the Civil Courts to be regulated "by this Act, and (except as otherwise provided by this Act) by no other law or Regulation."

It is said that, under the former law in practice, there was a power to review such an order as this. The letter of the old law distinctly authorized a review only in cases of decrees passed in regular Civil Suits (Regulation XXVI 1814, Section 4).

According to the former *practice*, and by constructions, the power to review was, I admit, held to exist in certain other cases, and (it may be) in such a case as the present. Assuming that, by law, or by practice having the force of law, such an order was formerly open to review, it seems intelligible enough that the Legislature, when it so materially altered the law of review (giving, by the new Code to the Courts generally of all grades, a power which they were previously allowed to exercise only by express permission of the highest Court in the land, and after submission of the grounds on which they sought to use this power), should have strictly confined the law of review to decrees.

Whatever may have been the intention of the Legislature, I hold that, by the express terms of the Civil Procedure Code, this review was without authority, and therefore illegal. The rules of practice, sanctioned by the Sudder Court in 1859, do not, in my opinion, apply to this case.

Mr. Justice Norman.—In the present case the plaintiff had obtained a decree for possession, and the mesne profits of a certain putnee against several persons as defendants. In execution of the decree he got possession of the land, realized the costs, and, on the 9th of February 1860, applied to the Zillah Judge for recovery of the amount of mesne profits with interest. Evidence was adduced before the Judge, who deputed a Commissioner to examine and make a local investigation into the account. On receiving his report on the 10th of July 1860, the Judge passed an order adjusting the mesne profits at Rupees 500. On the 11th of December 1860 several petitions of review were filed: one by the decree-holder, and two by two of the judgment-debtors.

At this time nothing had been done under the first order.

The Judge admitted the review, and, on the 10th of December 1860, made a final order, adjusting the amount of mesne profits at Rupees 3,524-8-17-3. An appeal to this Court against the second order came on for hearing before Mr. Loch, who reserved for the consideration of a Full Bench the question whether a Judge has power to review an order passed by him in execution of a decree. I think there is a power inherent in every Court, for the purpose of correcting errors in its own proceedings, to amend or vary interlocutory orders made in the course of a cause, and I am of opinion that the present case falls within that principle.

It was argued that the lower Court had no power to review, except such as is given by Act VIII of 1859. But it may be observed that, while, by Section 364, the Act expressly provides that, no appeal shall lie from any order passed after decree and relating to the execution thereof, there is no similar restrictive provision with respect to reviews. I see no reason why Section 376 should be construed as excluding reviews in all cases except those mentioned in it. The greatest inconvenience would result if such construction were put upon it: first, because, as no appeal is given by the Act in a case like the present, the Act would be construed as depriving the Judge and the parties of all means of correcting manifest and admitted errors in an order passed in execution of a decree; secondly, as no appeal lies from an order passed in the course of a suit, and relating thereto prior to decree (Section 363), if an erroneous order could not be rescinded or varied by the Judge who made it, it would be necessary to bring the suit to a conclusion, perhaps at great expense, before any opportunity could arise for correcting the error, though such error might vitiate all the subsequent proceedings in the cause.

I may observe that Sections 376, 377, 378, very nearly follow the language of the law previously existing upon this subject, *viz.* Regulation XXVI of 1814. The construction put by the Judges of the Sudder Court on this Clause was that it did not exclude the power of the Court to review orders passed in execution of decrees —(Construction, Sudder Dewanny Adawlut, 1375; Macpherson's Civil Procedure, 3rd edition, page 537.) We ought to assume that the Legislature, in re-enacting the Clause, knew the construction which had been put upon it. Moreover, it appears that the Judges who framed Rules of Procedure under the Civil Code, expressly recognize the power of a Judge to review orders. They, therefore, thought that the same construction was to be put on Section 376 as on the earlier enactment.

A decree stands upon a totally different footing from orders made in the course of the cause: as soon as it is passed and complete, the suit is at an end, and is no longer pending for decision. Independently of such power as may be given him by express enactment, it may be doubted if a Judge has any further power over the decree, except to correct any such errors manifest on the face of it, as are alluded to in Macpherson's Civil Procedure, page 393, 3rd edition; and therefore the Sections in question may be necessary to give the Judge power to review a decree. In any case, it seems both resonable and convenient that a power to re-open the question in a suit should be regulated by the Legislature; therefore, the enactment of Sections 376-378 is quite intelligible without the supposition that they were intended to exclude revision except in the cases expressly mentioned therein. No such considerations as apply to decrees apply to mere interlocutory orders in a suit. I am, therefore, of opinion that the preliminary objection fails, and that we must proceed to hear the case upon the merits.

The 30th December 1862.

Present:

The Hon'ble H. T. Raikes, W. S. Seton-Karr and L. S. Jackson, *Judges.*

Hindoo Law—Succession—Family migrating—Presumption.

Regular Appeals from a decision of Mr. A. Littledale, Judge of Nuddea, dated, respectively, the 26th May 1859, *and the 21st March* 1861.

Case No. 6 of 1859.

Ootum Chunder Bhuttacharjee (Plaintiff) *Appellant,*

versus

Obhoychurn Misser and others (Defendants) *Respondents.*

Baboos Aushootosh Chatterjee, Shumboonauth Pundit, and *Taruckmauth Sein* for Appellant.

Baboo Kishen Kishore Ghose for Respondents.

Suit laid at Co.'s Rupees 9,430.

Case No. 207 of 1861.

Nobin Chunder Perdhan (Defendant) *Appellant,*

versus

Janardhun Misser (Plaintiff) *Respondent.*

Baboos Aushootosh Chatterjee and *Poorno Chunder Roy* for Appellant.

Baboo Mohesh Chunder Mitter for Respondent.

Suit laid at Co.'s Rupees 4,695-13-0.

A Hindoo migrating from one province to another, and acquiring property in the territory where he settles, must be presumed, until the contrary be proved, to carry with him and retain all his religious ceremonies and customs, and consequently his law of succession; especially when the family is shown to have brought with it its own priests, who, and their descendants after them, continue their ministrations down to the period of contest.

This is an appeal from a decree passed by the Judge of zillah Nuddea on the 26th May 1859, in which in the suit Obhoy Churn brought, calling himself co-heir with his brother Janardhun according to the Hindoo law prevailing in Bengal, in default of issue, natural or adopted, of Nilcomul, deceased, the Zillah Court set aside the

adoption of one Nobinsoonder, said to have been made under authority from the said Nilcomul, and ordered the plaintiff, as co-heir, to be put in possession of his share in the estate.

The facts of the case are fully stated in the judgment of the lower Court and need not be repeated here.

We need only state that the minor, by his "attorney," that is, guardian and manager, Ootum Chunder Bhuttacharjee, besides various technical pleas of under-valuation of the suit and the like, pleaded, first, that plaintiff's family, into which he had been adopted, having originally migrated from Mithila, and being still governed by the laws of succession as prevailing among Hindoos in that province, plaintiff and his brother, being cousins on the mother's side, could not be heirs of Nilcomul while many relatives in the paternal line were in existence. He also pleaded that the adoption had been fully authorized and formally made.

An answer was also filed by the plaintiff's brother Janardhun Misser who had not joined in the suit. He alleged that he had been cajoled, in ignorance of his rights under the shasters, by the defendant Ootum Chunder, who was the family purohit, to acquiesce in the adoption of Nobinsoonder and to be associated in the office of "attorney" to the minor. He said that, acting under advice, he had for this reason abstained from bringing an action to establish his own rights; but he protested against being made answerable as defendant in the present suit, as he had done nothing to the plaintiff's prejudice.

The plaintiff put in a replication, meeting at great length and with copious argument the allegations in the minor's answer, and he separately replied to the answer of his brother Janardhun, contending that, as Janardhun admitted having acted as "attorney," he was necessarily made a co-defendant. Upon these pleadings the material issues of fact as between the plaintiff and the minor were—

1st.—Is the succession in this family governed by the law of Mithila or by that of Bengal?

2nd.—If the law of Bengal prevail, has the minor defendant been regularly adopted or no?

Upon the first of these issues a good deal of evidence was submitted to the Court below, and has been laid before us; and the question has been very fully argued on both sides.

The Judge found the law of Bengal to prevail, and we have to examine how far he was right in coming to that conclusion.

The evidence upon such a point as this must in general be, and in this case is, divisible into two classes: *first*, oral evidence, descriptive of the ceremonies and usages observed in the family at the present time and within the personal knowledge of the witnesses; and, *second*, the evidence of facts taken from the family history, such as their intermarriages, successions, acts, and admissions in Court, and the like, which are by far more valuable as being definite and practical professions of custom and for the most part admitting of no dispute.

Before entering upon any consideration of the evidence itself, it is necessary to determine on which party the burthen of proving his contention lies, for much will depend upon this when the evidence is all nearly balanced; and we do not find it laid down in any case what the presumption as to the law of succession is to be in a case of a proprietor domiciled in Bengal, but coming of a Mithila family in respect of property situated in Bengal.

In the case of Rutcheputty Dutt Jha* and others *vs.* Rajunder Narain Rae and another, the Privy Council, approving of the decision in Rajchunder Narain Roy Chowdhry's† case, held, confirming the Sudder Court's decree, "that, in a case where a family migrates from one territory to another, if they preserve their ancient religious ceremonies, they also preserve the law of succession."

Thus, it being admitted that a Hindoo, migrating from one province to another and acquiring property in the territory where he has settled, is at liberty to carry with him his personal law so as to override the law of domicile or that of the *locus rei sitæ;* and regard being had to the constitution of Hindoo society and to the well-known attachment of Hindoos to their ancient religious customs and observances, we think, after mature consideration, that a Hindoo so migrating must be presumed, until the contrary be proved, to have brought with him, and retained, all his religious ceremonies and customs, and consequently his law of succession; and this more especially when the family is shown to have brought with it its own priests, who, and their descendants after them, continue their ministrations down to the period of contest.

It will be for the party who sets up a departure from ancestral law to show that the family has in some material respect abandoned its ancient religious usages, in which, if he succeeds, he may contend that the principle laid down in the cases above quoted does not apply; and, of course, if he can show that, in matters connected with succession, the law of the country of domicile has been adopted, the presumption arising from the observance of ancient customs (if such observance was proved) would at once be negatived.

Let us see, then, how far the plaintiff, who in this case asserts a family originally from Mithila to have adopted the law of Bengal, has proved his allegation.

The evidence which the Judge has considered as establishing this contention consists of, first, the testimony of thirteen witnesses examined for the plaintiff, who depose generally that "the religious ceremonies of the family have been partly performed according to the Mithila shasters and partly according to those of Bengal;" some of the witnesses specifying the marriage ceremonies as regulated by the former and those connected with funerals and oopanyan by the latter. "One of the witnesses," the Judge observes, "Ramchurn Oopadhya, the plaintiff's purohit, and brother of the defendant, Ootum Chunder, states

* Moore's Indian Appeals, Vol. II., p. 132.
† Sel. Rep. S. D. A., Vol. I., p. 43.

that many of the religious ceremonies are regulated by the shasters of Bengal, and some by the Mithila law." After noticing the counter-evidence for the defendant which he considers less full on this point, and at once dismissing the evidence of Ootum Chunder, the defendant, as that of an interested party, the Judge refers to the case of Rajchunder Narain Chowdhry *vs.* Gocool Chunder Goh,* and remarks that, in the present case, "the same features appear." "Following, therefore, that decision," and looking especially to the fact of a succession by a childless widow in the family as a very strong circumstance, he decides the issue of Mithila or Bengal in favor of the plaintiff.

We may at once observe that, if the circumstances of this case were precisely similar to those in the case of Rajchunder above cited, the decision would be easy enough. But it unfortunately happens that, in both the leading cases on this point, the facts were so well ascertained as to leave only a necessity for applying the law, whereas in the case before us the facts are disputed and the evidence is conflicting.

In the earlier case, on reference to the report (page 44, vol. i. of the Sel. Rep.), we find it appeared from the evidence that "the purohit of each of the parties was a Brahmin of Bengal; that the ancestors of the parties had intermarried with Bengal women," &c., &c.; and the words of Mr. Colebrooke's foot-note are—"By the disuse of them" (the natural law and usages), "and adoption "of the customs and laws of Bengal and employ-"ment of priests of this province in religious rites, "the family was considered to have adopted Ben-"gal for its country in all matters."

That was a case perfectly clear, in which the appellant had nothing to rely on but the original descent from a Mithila family, which descent, however, became of no effect because of the subsequent clearly proved conformity to the law of Bengal where the family now resided, and where moreover the "contested lands were situated."

Here there is not a word of intermarriage with Bengal women, and the family purohit is, like the family itself, admittedly of Mithila descent, his ancestor having in fact immigrated with the ancestors of the parties.

On the other hand, in the later case decided by the Privy Council in 1839, Moore's Ind. App., vol. II., the admissions, equally explicit, were all the other way. In that case it was "acknowledged by the appellant that all ceremonies of mourning and rejoicing (*viz.* all religious ceremonies and some of a a civil nature, including marriage) are performed in the families of both appellants and respondents by a Mithila purohit and according to the Mithila shasters."

Thus, while the law of those cases is perfectly clear and readily applicable to the case before us, the state of the facts and of the evidence is wholly different.

Now, upon a review of the oral evidence which bears upon the question of usage in the family, Bengal or Mithila, we consider it to be inconclusive on either side, and that, consequently, as far as that evidence goes, the party who has affirmatively to prove his contention must fail. No doubt the witnesses for plaintiff and defendant alike establish petty departures in detail from the strict ceremonial law of Mithila, and this is not to be wondered at with pundits not remarkable for erudition in matters either sacred or profane, surrounded by a Bengali population, and having access for the most part only to Bengali books: it is only natural that, in minor observances and occasions, Bengal innovations should creep in; and it is a departure of this kind, rather than a disuse of the Mithila rites and adoption of those of Bengal, which the witnesses for the plaintiff have proved, if they have proved anything.

It was aptly enough observed by the respondent's vakeel, Baboo Kishen Kishore Ghose, that families situated like that of the defendant commonly use the customs of Bengal for every-day purposes, and produce the law of Mithila for their law suits. But whatever justice there may be generally in this remark, we are bound to say that nothing advanced by the plaintiff's witnesses is inconsistent with the view that this family, as far as its members were interested, meant to keep up, and did virtually keep up, the customs and the law of the country in which they had originally resided.

The Judge dismisses the testimony of Ootum Chunder, the defendant, with the remark that he is an interested party and therefore not to be relied on. Now, it must be remembered that this person was in truth only a party to the suit on behalf of the minor, of whose attorneys or managers he was one. This boy must have been very nearly of age when the evidence was given, and Ootum Chunder's interest was very small indeed.

This evidence, consequently, deserved a little more examination than it has received.

It is admitted, however, on all hands, that, if the plaintiff could show, from the history of the family in recent times, that, in such matters as marriage, adoption, inheritance, and the like, they had practically followed the law of Bengal, such proof would render the kind of evidence which we have been discussing of very inferior importance.

We find accordingly, in the second branch of evidence, that one example of conformity to the Bengal rule of succession is brought forward on the plaintiff's side.

This is the inheritance of Soobhudra, a childless widow, of the share of her husband, Totaram (who died in 1232 Pous), the elder brother of Bydonauth, from whom plaintiff and Nobinsoonder, supposing that his adoption stands, are both descended.

This, it is admitted, could not have taken place in a joint undivided Hindoo family under the law of Mithila.

A fact so important of course demands investigation, and we find the proof of it consists in a decree of the Provincial Court of Moorshedabad, under date 19th November 1829, in which Musst. Soobhudra is set down as the widow and representative of Totaram, deceased, who had been

one of the original defendants. This appears to have been a suit connected with a putnee talook in which the Paul Chowdhry zemindars were plaintiffs.

The other defendant was Deenoomoyee, the widow of Chundichurn, and mother of Nileomul, who represented Bydonauth, the younger brother of Totaram, who had died fourteen years earlier; and, in accordance with this state of things, petitions, dated the 30th March 1827 and 8th May 1833 have been filed as coming from Soobhudra and Deenoomoyee, relative to the payment of rent for this talook.

It is to be observed that there was neither adjudication nor dispute upon this matter of succession.

Now, we are not disposed to think that the mere assumption by Soobhudra of rights which, if the family were still Mithila, did not belong to her, would be in itself extremely important, unless it were shown that other heirs at that time existed whose rights were affected by her proceedings and who were in a condition to resist. If this indeed were so, the silence of such heirs would be very significant.

But we find the death of Totaram took place in Pous 1232, just one month after that of his nephew and male heir Chundichurn, when the grandnephew and next heir of Nileomul, son of Chundichurn, was a child in arms (born 1231), his mother Deenoomoyee being his guardian.

Under these circumstances, nothing could be more probable than that Soobhudra, having only a young widow to deal with, should assume the direction of her deceased husband's share in the family property, and continue in possession of it until Nileomul came of age; and, as remarked by the appellant's vakeel, there is no evidence of her possession after he attained his majority.

That Soobhudra was a woman of great influence in the family and considerable vigour is evident from the subsequent history of events, for we find her, in the will propounded as Nilcomul's, associated with his wife Hingolamoyee, and his mother Deenoomoyee (abovementioned), in the management of his estate for the benefit of the son to be adopted by his wife. She finally outlived them both, dying in 1258.

We cannot, therefore, look upon the alleged succession by Soobhudra to her husband as being of itself conclusive as to the law which governed this family; and as we think the oral evidence insufficient, and thus find the plaintiff to have failed in supporting the burthen which the naturs of the case has laid upon him, it follows that the first material issue is decided against the plaintiffe respondent; that this suit cannot proceed; and, that the judgment of the lower Court in his favor must be reversed, with all costs of this Court and of the Court below.

The 30th January 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, and F. B. Kemp, *Judges.*

Jurisdiction (of Deputy Collector)—Resumption suits (under Section 30 Regulation II. 1819).

Case No. 86 of 1862 under Act X of 1859.

Special Appeal from a decision of Mr. F. B. Kemp, Judge of Jessore, dated the 16th November 1861, *reversing a decree of Baboo Ramchunder Paul, Deputy Collector of Sulkea, dated the* 15*th July* 1861.

Goureekaut Banerjee (Plaintiff) *Appellant,*

versus

Lall Mahomed Mollah and others (Defendants) *Respondents.*

Baboos Kishen Kishore Ghose and *Sreenauth Dass* for Appellant.

Baboo Dwarkanauth Mitter for Respondents.

A Deputy Collector has no jurisdiction to try a suit under Section 30 Regulation II. 1819, but should return the plaint and refer the party to the Collector who has jurisdiction.

This was a suit brought under Section 30 Regulation II of 1819, and not under Section 28 Act X of 1859. Having been brought under Regulation II of 1819, the Deputy Collector had no jurisdiction to try the case. We think that he ought to have returned the plaint, so that the party might go to the Collector who had jurisdiction. Under these circumstances the decision of the Deputy Collector ought to have been reversed by the Judge. We, therefore, reverse it now, and order the case to be sent back to the Deputy Collector, with directions that he may return the plaint.

We are of opinion that, under the circumstances, no costs ought to be allowed on either side. We cannot say any thing as to the time which has elapsed, pending the proceedings in this Court, as regards the question of limitation.

The 30th January 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, and F. B. Kemp, *Judges.*

Lakheraj (Assessment or resumption of alleged invalid)—Jurisdiction of Collector to try validity of title of grants prior to 1790.

Case No. 1909 of 1861 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. F. Lautour, Officiating Judge of Behar, dated the 5th August 1861, *affirming a decision of Mr. W. J. Longmore, Collector of that District, dated the* 10*th June* 1861.

Mooroobbee Sahoo (Plaintiff) *Appellant,*

versus

Latoo Koomar *alias* Dyebuttee Koonwar and others (Defendants) *Respondents.*

Mr. A. F. Lingham and *Moonshee Ameer Ali* for Appellant.

Baboos Dwarkanauth Mitter and *Unoda Persad Banerjee* for Respondents.

In a suit by a zemindar to assess or resume land alleged to be invalid lakheraj under Section 28 of Act X of 1859, a Collector has no jurisdiction to try whether a title under a grant made prior to the 1st of December 1790, is valid or not.

THE plaintiff in this case was the zemindar. The defendant claimed to hold certain land as lakheraj. The plaintiff claimed to resume it as mal or rent-paying land, and made application to the Collector under Section 28 of Act X of 1859. That Section repeals so much of Section 10 Regulation XIX of 1793 and corresponding Regulations "as authorizes and requires proprietors and farmers of estates and dependent talooks, in cases in which grants for holding land exempt from the payment of revenue have been made subsequent to the dates specified in the said Sections (the date in this case being 1st December 1790), of their own authority to collect the rents of such land, and to dispossess the grantees of the proprietary right in the land and to re-annex it to the estate or talook in which it may be situate." Having repealed those Sections to the above extent, Section 28 goes on to provide that "any proprietor or farmer who may desire to assess any such land or to dispossess any such grantee shall make application to the Collector, and such application shall be dealt with as a suit under the provisions of this Act."

The plaintiff did not state in his application that the grant under which the defendant claimed was subsequent to the 1st December 1790, and he did not show that his case came within the provisions of Section 28. The Deputy Collector might consequently have rejected the application. But the application was admitted. The defendant claimed to hold the land as lakheraj under a grant prior to 1st December 1790, and the plaintiff did not give any evidence to show that the grant was made subsequent to that date. The first Court (the Deputy Collector) held that the plaint was barred under the Limitation Clause in Section 28, but eventually the suit was dismissed by the Collector, not as barred by lapse of time, but because he was of opinion that the Sunnuds were granted previous to 1790 A. D., and further that the defendants and their ancestors had been in continuous possession from the time of the grant.

The Collector (under Section 28 Act X of 1859) did not enter into the question whether the grant was valid or not; and he was right, because he had no jurisdiction to try whether a grant, made prior to the 1st December 1790, was valid or not.

The plaintiff appealed to the Judge, who stated that he saw no reason to interfere, and, therefore, dismissed the appeal with costs. The Judge was right in dismissing the appeal. He would have been wrong, had he entered into the question as to the validity or invalidity of a grant, made prior to 1790, in a suit instituted under Section 28 Act X of 1859; but although he had no jurisdiction to try whether the Sunnud [illegible] prior to 1790 was a valid Sunnud or not, he had a right to decide whether he could try that question; and as the appellant appealed to him and failed in the appeal, he was quite competent to dismiss the appeal with costs.

Then the plaintiff appeals to us, and we are asked to remand the case in order that the validity or invalidity of the Sunnud may be determined. But we cannot send back a case to be tried by the Judge when, if he had tried it, we should have reversed his decision.

It was contended that the Sunnud was not registered according to the directions of Section 26 of Regulation XIX of 1793, and was therefore void. But there is a great distinction between a Sunnud granted subsequent to the 1st December 1790, and a Sunnud granted prior to 1790, which may have become void for want of registry. Section 28 of Act X of 1859 applies only to the former, and extends to cases of Sunnuds granted prior to the 1st December 1790, although they may be void for want of registration under Section 26 of Regulation XIX of 1793.

The parties having appealed to us we hold that, they have no ground for appeal, and dismiss the appeal with costs and interest at 12 per cent from this date to the date of realization.

The 9th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Forgery (Copies of Documents)—Ordering of investigation by Magistrate under Section 171, Code of Criminal Procedure.

Case No. 32 of 1862.

Regular Appeal from a decision of Mr. E. Lautour, Judge of the 24-Pergunnahs, dated the 8th February 1862.

Essan Chunder Dutt and others (Plaintiffs) *Appellants*,

versus

Baboo Prannauth Chowdhry and another (Defendants) *Respondents*.

Baboos Kishen Kishore Ghose, Sreenauth Dass, and *Obhoychurn Bose* for Appellants.

Baboos Bungsheebuddun Mitter and *Poorna Chunder Roy* for Respondents.

Suit laid at Rupees 14,071-8*a*.

The forgery of a *copy* of a document comes within the definition of Forgery as contained in Section 463 of the Penal Code.

A Court has power to send a case for investigation to a Magistrate, under Section 171 of the Code of Criminal Procedure, where no particular individual has as yet been *accused*.

THERE are four plaintiffs in this case, namely, three Mahomedan ladies, and one Essan Chunder Dutt.

The subject-matter in dispute is the estate of the late Noor Jehan, and involves 14 beegahs 7 cottahs, situated in Cossipore, in the possession of Baboo Prannauth Chowdhry as mortgagee, under a decree of the Privy Council, dated 7th July 1859, (*vide* "Moore's Indian Appeals," Vol. VII, page 323).

That decree allowed an equity of redemption to those who might eventually be proved to be the legal heirs of Noor Jehan.

The three Mahomedan ladies, plaintiffs, claim this right as heirs of Noor Jehan. Plaintiff, Essan Chunder Dutt, claims as having purchased from them their rights and interests. His purchase is admitted by the ladies. The amount necessary to redeem the mortgage, namely Rupees 10,669, is stated by both parties to have been duly tendered for deposit in Court; but the plaintiffs' claim to redeem was rejected *as a summary case*, by the Civil Court, on the 9th January 1860; hence the present *regular* suit.

The defendant Prannauth Chowdhry relies on his possession decreed to him by the Privy Council on his two mortgages, dated respectively the 11th of Cheyt 1231 and the 23rd of Bysack 1232. He also pleaded limitation; but this is now waived, and this plea need not be further noticed. On the merits, he denied that the three Mahomedan ladies were the heirs of Noor Jehan, and averred that Noor Jehan died without any heirs at all.

It is right in this place to notice that Rookya Begum intervened in this suit, claiming as daughter of Enayet Ally who was the brother of Noor Jehan. The plaintiffs denied this to be the fact.

On these pleadings, and on the evidence adduced, the Judge dismissed the plaintiffs' claim, holding the evidence not to support it, and part of that evidence to be forged. Moreover, in respect to this part of the evidence, the Judge ordered the Magistrate to hold an enquiry as to who was the party guilty of the forgery, and to adopt the necessary measures for his punishment.

The plaintiffs appeal both against the Judge's decision on the merits as opposed to the evidence, and against the order directing the Magistrate to make a local enquiry as to who forged the evidence indicated by the Judge.

We now proceed to give our judgment on these issues thus put before us by this appeal.

It will be as well to premise that there was much previous litigation in respect to this property, which resulted in two appeals to the Privy Council—the *first*, in which Ramrutton claimed under his alleged deeds of sale; and the *second*, in which Prannauth Chowdhry claimed under his mortgages. The first suit was commenced on the 30th August 1832. In that suit Furrookoonnissa, widow of Imdad Ali, and Rookya Begum, the daughter of a deceased sister of Meer Sydoo, sued for this property under a *hibbahnamah* or deed of gift which they alleged had been executed by Noor Jehan in favor of Lootf Ali and Imdad Ali; and they alleged that by the deed of gift, and also by the *Furaez*, or Mahomedan law of Inheritance, the whole estate of Noor Jehan [illegible] and that of Meer Sydoo devolved on Imdad Ali and Lootf Ali, and, after their demise, devolved on Furrookoon-nissa and Rookya Begum.

The Privy Council were satisfied in that case that the deed of gift under which Furrookoonnissa and Rookya Begum claimed through Meer Sydoo, was a fabricated instrument (Vol. II. Moore's Indian Appeals, page 243).

Rookya Begum is the intervenor in the present suit; but she comes in here, not on the title of the deed of gift which she then pleaded, but alleging herself to be the direct heir, and thus entitled to the equity of redemption.

In the other case which was decided by the Privy Council in 1859 (Moore's Indian Appeals Vol. VII., page 333), Prannauth Chowdhry was the appellant to the Privy Council, relying on his mortgage title. Their Lordships in that case decided that the mortgage of Prannauth Chowdhry was valid, and that his claim was not barred by the Statute of Limitations. The Privy Council remarked that a grave suspicion rested on Ramrutton's alleged purchase, which the litigation, so far from dispelling, had increased; and they further hold that Ramrutton Roy, if he became a purchaser as he alleged, took with the notice of the mortgage title which in terms forbade any subsequent sale, and that Prannauth Chowdhry's claim was not barred under the Statute of Limitations.

The Privy Council further observed that, had the course of proceeding in the Courts below admitted of a judgment for the mortgage money, with interest and costs, in a suit for possession of the property pledged to secure it, their Lordships would have so limited their decision on this appeal; but as the decision in this proceeding was not final, it would not affect any right to redeem to which the heirs of Noor Jehan might be entitled, upon which their Lordships forbear from offering any opinion.

It may be noticed that though Rookya Begum, for the purposes of argument in that particular appeal, was assumed to be the heiress of Noor Jehan, her title was not investigated, nor was it decided, so as to give her, against all others, the equity of redemption. Thus these three Mahomedan ladies, plaintiffs, claiming as heirs of Noor Jehan, may still be declared to have a right to the equity of redemption, if their right to the heirship be proved.

We have now to consider, *first*, whether the three Mahomedan ladies, plaintiffs, are proved to be such heirs, and are, therefore, entitled to the equity of redemption; and *next*, whether plaintiff, Essan Chunder Dutt, is entitled to possession and declaration of his rights as representing the hereditary rights of those ladies. The plaintiffs state that Noor Jehan had two brothers and one sister; that the sister was Chutoo Bebee who died childless; the brothers were Misroo Khan and Husnoo; Husnoo had no children; Misroo married Mootee Jan, and had a son Juboo; Juboo married the plaintiff Ramjoo; Juboo had a son Hurjan, whose surviving issue is a daughter, the plaintiff Aswub Bebee. The third plaintiff is Beebee Manjoo, daughter of Juboo. To support this alleged

pedigree, plaintiffs put in copy of a deed of dower and copy of a deed of security, purporting to be true copies of the original documents filed with the Cazee of this city.

The deed of dower recited that Juboo, the son of Misroo, had married Ramjoo, and had given her a certain dower. The deed of security purported to have been given by Noor Jehan on account of that dower, and also recited that Juboo, the son of Misroo, had married Ramjoo and given such dower. The Judge sent for the Cazee's books and found in them three names as those of witnesses, whereas the copy put in by plaintiffs had five names.

In this appeal it is suggested that the original sheet in the Cazee's book corresponded with the copy as filed in Court, but that some one had changed the former after the copy had been taken by plaintiffs.

It is not necessary for us to refer further in this place to these documents as evidence for the plaintiffs' case (though of course as the propriety of the Judge's order in respect to these being forgeries, is a matter of appeal before us, we shall have to refer to them in respect to the grounds of appeal connected therewith, hereafter), because we think the documents, being copies, were inadmissible as evidence till sufficient reason had been given, as required by the law of evidence, why the originals were not produced, and no such reason was given either below or here. We have further to remark that the Judge did not go upon this evidence; he rejected it as forged, and he gave his decision on the other evidence in the case.

Now, plaintiffs' other evidence consists of plaintiff Essan Chunder Dutt's oral testimony and that of seven others; and from among these last, the pleader here more especially relies on the testimony of Sonooda, Fukhooddeen, and Ahmed Ally; and he urges that oral testimony alone is sufficient to prove pedigree. On this latter point we may here remark that, of course, we do not question that the oral testimony of persons intimately acquainted with the members of a family, is admissible and may be good proof in matters of pedigree; but we think it is always for a plaintiff to adduce as witnesses in this matter well-informed and trustworthy persons. Now we find that the Judge disbelieved the witnesses. They were examined before him, and he had the means of judging of their demeanour, and applying other tests as to their credibility, which we have not. He had to decide not only on the law but the facts, and we cannot say that the Judge was wrong in his estimate of the evidence of these witnesses. Nothing has been shown to us to induce us to think that he was wrong, and we think it right to follow the principle laid down by the Privy Council in the following remarks from Moore's Indian Appeals—"If they (the Lower Court) were right in law, the question is whether they were right in fact, and upon that question the course which this Court always takes in appeal from the inferior Courts of India, where the Judges are so much more familiar with the circumstance of the parties, the nature of the case, and the probabilities or improbabilities attached to certain states of circumstances, and the credibility of the witnesses is that, although we by no means consider it conclusive, still great weight is to be given to their opinion, and this Court is not in the habit of disturbing a judgment founded upon a decision of those questions, unless their Lordships entertain a clear and strong opinion upon it. But when a judgment has been pronounced, and a verdict found, and that judgment pronounced by the Judges of the Supreme Court sitting as a Court for the purpose of the trial of an action, their Lordships will give at least the same weight to that decision, as is given in this country to the verdict of a Jury, to which the Judge who tries the cause makes no objection, and where there are no reasonable grounds to suppose that the Jury have come to a wrong conclusion.

"It is not sufficient to say that the Judge might probably, if the case was *res integra*, have come to a different conclusion. We are far from saying here that, if the case had been *res integra*, we should have come to a different conclusion from that which the Judges of the Court below have come to, and we think their order was perfectly right."

Now in this case it is not shown that the Judge is wrong in his conclusions, nor can we say the witnesses whom he has disbelieved were worthy of credit.

If the case was *res integra*, we should come to the same conclusion as that at which the Judge arrived. We have neither reliable documentary nor trustworthy oral evidence before us in support of the plaintiffs' case; disbelieving the plaintiffs' case, it was not necessary for the Judge, nor is it necessary for us, to look at the testimony of defendants' witnesses. But it is necessary for the purposes of justice, and especially in the country where oral testimony is so far less reliable than in England, to look at the probabilities of a case as supporting or contradicting oral testimony. Applying that test, what do we find? We find three Mahomedan ladies, after a previous possession by Ramrutton, and after a long litigation between him and the mortgagee, advancing their claim of inheritance to the land in suit, and selling their title to the other plaintiff, Essan Chunder Dutt. Is it probable that Essan Chunder Dutt who was a mere corresponding clerk in the office of Lyall Rennie and Co., would pay Rupees13,000 to purchase a title so long dormant, and one for an equity of redemption which it was certain would be disputed by rich and powerful litigants such as Ramrutton Roy and Prannauth Chowdhry.

Does not every thing indicate that the presumable conclusion is that Essan Chunder Dutt is a mere tool in the hands of Ramrutton Roy, who, defeated when suing in his own name upon the title which he then set up, is trying under a fictitious name, and under a new, if not equally fictitious title, to attack again the adversary who had succeeded in obtaining the last decree against him in the Privy Council. Be

this as it may, we are of opinion that the Judge came to a correct conclusion upon the facts, and that we should not be justified in reversing his decree.

The remaining point to be considered is whether the Judge's order directing the Magistrate to make an enquiry as to whether forgery had been committed in this case, and by whom, should be reversed.

The facts on which the order is based are admitted on both sides, and have been adverted to in a previous part of the judgment. The Judge found that a copy of the Cazee's record, produced as a true copy, contained the names of *five* attesting witnesses, whereas the original, when sent for and examined, was found to contain the names of *three* only. He considered, therefore, that the copy produced in his Court was forged.

The pleas in appeal on this point are briefly:

I. That Section 463 Act XLV of 1860 does not apply to copies.

II. That Section 171 of Act XXV of 1861 contemplates that the Judge shall, in the first instance, himself investigate such cases, and fix on any party whom he thinks guilty of the offence, and shall then, and only then, order the Magistrate to take up the case only in respect to such person as he, the Judge, may indicate as the person to be tried for the offence.

III. That the conduct of the parties in requesting the Cazee to be sent for with his books, was not such as parties guilty of forgery would pursue, inasmuch as they would be actually producing the means for the detection of their own guilt.

Lastly. That there was no probability of forgery, and that the plaintiff's innocence of forgery and the fact of the original document at the same time having the names of only three attesting witnesses, while the copy adduced had the names of five, were reconcilable, if we suppose that another false leaf had been interpolated on the original record of the Cazee's office.

Now what does the Judge order? Not that any particular party should be sent to trial for forgery; but he tells the Magistrate to investigate, and, if there be grounds to think any party guilty of forgery, to proceed according to law. Could he not pass this order by the law? We are clearly of opinion that he could.

Section 463 is as follows:

"Whosoever makes any false document or part of a document, with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

We regard the forgery of a copy clearly to come within the purview of the just cited Section. Forgery of a copy, which was no true copy, would be the offence there rendered penal, and the criminal intention to make a false document serve the purpose of a true one, would be clear by such act a forgery.

On the second point, we observe that the pleader lays particular stress upon the terms of Section 171 Act XXV of 1861. That Section is—"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for investigating any charge mentioned in the last three preceding Sections, the Court, after making such preliminary enquiry as may be necessary, may send the case for investigation to any Magistrate having power to try or commit for trial the *accused person* for the offence charged, and such Magistrate shall *thereupon* proceed according to law, and the Court shall have the power to send *the person accused* in custody, or to take sufficient bail for his appearance before such Magistrate, and may bind over any person to appear and give evidence on such investigation."

The words especially relied on for the appellant, "the accused person," are in italics. It is urged that "the accused person" must refer to an individual selected *after* an investigation by the Court, before whom the alleged offence may have been committed; and that the Section cannot justify an order for the Magistrate to investigate and fix upon a person who shall be then accused by the Magistrate, and, if deemed guilty, committed for trial.

We cannot concur in this view of the law. Section 171 gives in express terms a power to any Court to send *the case for investigation to any Magistrate*, and such Magistrate shall thereupon proceed according to law. If there be a person distinctly accused, of course the Magistrate can proceed equally against *him*, as he can in investigating a *case* send to him. But there is nothing in the Section to prevent the investigation of a *case* where no particular individual is as yet accused. The investigation is to show whether any or what person is to be charged under the law.

We do not, therefore, think the Judge's order illegal on this ground, nor is it one which we see reason to reverse on appeal in a Civil case as contrary to law.

Moreover, no injustice is done by the order to any one. If, on investigating the case so sent, it appears to the Magistrate that there is no proof to warrant his committing any one, no one can be injured. If, on the other hand, the result of the investigation shows that some one has committed forgery, that person ought to and will be proceeded with according to law; and, if found guilty by a competent Court, he will be punished for his crime. It will of course be open to all parties to adduce such evidence at the investigation of the case so ordered, as they may deem fit; and we repeat we are of opinion that no injustice or illegality exists in the Judge's order now appealed against.

We would add in this place that, if the Judge had even cited a wrong Section for his order, but his order was at the same time substantially legal, we would not, on the ground of the mere error of form, reverse it in such a case as this, nor do anything to prevent an investigation which we think legal and proper.

Thus having reviewed all the circumstances of the case, and considering the arguments and record in appeal, we are clearly of opinion that there is no ground to interfere with the decision of the Court below, either as to the case on its merits, or as to the order of the Judge directing the Magistrate to investigate and see if any person, and, if any, who has been guilty of forgery, and thereupon to proceed according to law.

We, accordingly, affirm the decision and orders of the lower Court, and we dismiss the appeal with costs, and interest at 12 per cent., on those costs till they be paid.

The 11th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Hindoo Law (Mitacshara)—Family migrating—Presumption—Inheritance (Daughter and Son's Daughter).

Case No. 3 of 1862.

Regular Appeal from a decision of Roy Nobinkishen Pauht, Principal Sudder Ameen of East Burdwan, dated the 6th Noovember 1861.

Koomud Chunder Roy (Plaintiff) *Appellant,*

versus

Seetakanth Roy and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Dwarkanauth Mitter* for Appellant.

Baboos Mohendro Loll Shome and *Chunder Madhub Ghose* for Respondents.

Suit laid at Rupees 2,411.

Where a family originally migrated from the Mithila province to the province of Bengal, the presumption is that they have preserved the religious rights and customs prescribed by the Mitacshara Law, unless the contrary be proved.

According to the Mitacshara Law, a Daughter or Son's Daughter does not inherit.

This was a claim to recover possession, with mesne profits, of a share equal to one-anna twelve-gunda, or a one-tenth of certain properties stated in a schedule appended to the plaint. The plaintiff alleges that he attained his majority on the 3rd of Pous 1266 B. S. The plaintiff in his written statement alleges that his father Tarachand Roy was one of three uterine brothers* who lived in commensality, and that their property, real and personal, was held joint; that Boykuntonauth was an attorney on a small salary; Issurchunder a Police darogah; and that Tarachand, the father of the plaintiff, remained at home looking after the affairs of the family, but that he traded and amassed considerable wealth; that all the brothers contributed to the common fund, and that properties were acquired by the joint funds: that the second brother, Issurchunder, first died, as also his son, Radhagobind, without leaving male issue; that the plaintiff's father, Tarachand, and his uncle, Boykuntonauth, held the property jointly, and acquired more estates in their own names and in the names of others; that Boykuntonauth Roy, the eldest brother, died in 1249 B. S., and Tarachand, the father of the plaintiff, in 1257 B. S.; that the plaintiff and his four brothers are entitled to inherit the estates of Tarachand Roy in equal shares, or each brother a one-anna-twelve-gunda share, and that the defendant, as guardian of Seetakanth Roy, a minor, is entitled to inherit the remaining half of the estate; that certain properties which are claimed by Chukinloll, the son of Boykuntonauth Roy, as his separate estate inherited from his maternal family, ought not to be excepted from the decision, but that plaintiff is entitled to a share equal to one-anna twelve-gunda in those properties; that the defendant admits that the family lived in commensality up to 1258 B. S., and that up to that year the estate was held joint and undivided; that the suit is not beyond time, inasmuch as the plaintiff did not attain his majority until the 3rd of Pous 1266 B. S.

The answer of the principal defendant, Sobitra Dabea, guardian of Seetakanth Roy, the grandson of Boykuntonauth Roy, is briefly to this effect: that the whole of the properties were acquired by the eldest brother Boykuntonauth Roy; that neither the father of the plaintiff nor Issurchunder Roy, acquired any thing, that they contributed nothing to the joint fund, and that the plaintiff's father was permitted to remain in commensality, simply as an act of charity on the part of his brother the aforesaid Boykuntonauth Roy; that Chukinloll, the father of the minor Seetakanth and the son of Boykuntonauth Roy, obtained certain properties in gift or otherwise from his maternal grand-father; that the father of the plaintiff was never for a day in possession of the properties which formed the separate estate of Chukinloll: that on the occasion of the serious illness of Boykuntonauth Roy who was the head of the family, Tarachaund Roy, the father of the plaintiff, became anxious to recover some maintenance for himself in case of the demise of Boykuntonauth Roy; that Boykuntonauth requested Chukinloll, his son, to give him a talook by name Perogram—the said talook being one of the properties acquired by Chukinloll from his maternal grandfather;—that Chukinloll consented to this arrangement; that the said talook was incorporated with the other self-acquired estates of Boykuntonauth Roy, and a deed drawn up on the 21st Cheyt 1249 B. S., by which deed one-half of the self-acquired estate of Boykuntonauth was allotted to Tarachand Roy, the whole of the aforesaid talook of Perogram falling to the share allotted to Tarachand—the said deed contained a stipulation that the whole estate was to remain joint so long as the family remained on good terms;—that Boykuntonauth Roy died on the 21st Cheyt 1249, and Tarachand on the 7th Srabun 1257 B. S.; that the elder brothers of the plaintiff, or Nobin Chunder Roy and Poorno Chunder Roy, and his mother Netomoyee Dabea, on

* 1.—Boykuntonauth Roy. 2.—Issurchunder Roy. 3.—Tarachand Roy.

behalf of her minor sons, effected a partition of the properties acquired by Boykuntonauth Roy as per terms of the deed of date the 21st Cheyt 1249; that the brother of the plaintiff, on the 10th Maugh 1258, executed a deed of partition to Chukinloll, the father of the defendant's ward; that a further deed was executed in 1263 B. S., that since the year 1258, the estate has been held in equal, but separate shares by the heirs of Boykuntonauth and of Tarachand, subject to a charge for certain religious purposes and for the maintenance of the female members of the family of the second brother, Issurchunder Roy; and that the plaintiff attained his majority in the year 1268 B. S.

The Principal Sudder Ameen of Zillah Burdwan, in his judgment of the 6th November 1861, held that the deeds of 1249 B. S. (21st Cheyt), 1258 B. S. (10th Maugh), and 1263 had been satisfactorily proved; that the evidence showed that the plaintiff, with his brothers, held possession of the share which devolved to him under the deed of partition; that the claim of the 3rd party who had been admitted as a party to the suit, under the provisions of Section 73 Act VIII of 1859, was inadmissible, inasmuch as the family were governed by the *Mitacshara* law, and not by the law current in Bengal, *i. e.* the *Dayabhaga*; and that the claimant, being the grand-daughter of Issurchunder Roy, is entitled under the former law to maintenance only. The suit of the plaintiff was dismissed, with costs.

Two appeals have been preferred against this decision, one by the plaintiff and the other by the claimant, Kishoree Dabea.

The plaintiff, appellant, urges, amongst much irrelevant matter, the following pleas:

1st.—That the deed dated 21st Cheyt 1249 B. S. is a forgery.

2nd.—That the deeds of 1258 and 1263 B. S. have not been proved; and that granting that they have been proved, plaintiff, appellant, is not bound by them.

3rd.—That the defendant, respondent, has failed to prove that any properties were acquired by her husband, Chukinloll, from his maternal grand-father.

The claimant who prefers a cross appeal under Section 348 Act VIII of 1859, urges—

First.—That as the Hindoo law, as current in Bengal, is applicable to the family of the parties to this suit, and not the *Mitacshara* law, the claimant, as grand-daughter of Issurchunder Roy, is entitled to one-third of the estate, or the whole of the share of Issurchunder Roy.

Second.—That the evidence adduced fully shows that the parties to this suit and their ancestors have adopted the customs and usages of the Hindoo law as prevailing in Bengal.

Third.—That the claimant never consented to receive mere maintenance.

We have to consider in these appeals—

First.—Whether the deeds of 1249, 1258, and 1263 B. S., are genuine instruments, and have been sufficiently proved.

Second.—Whether the properties which it is alleged were acquired by Chukinloll from his maternal relations ought to be excluded from the joint estate, and not brought into the division.

Third.—By which law the family of the contending parties is to be governed.

We have no doubt that the three deeds are genuine, and that they have been sufficiently proved. The deed of 1249 B. S. is recited in the subsequent deeds of 1258 B. S. and 1263 B. S., and the brothers of the plaintiff and his mother, as guardian to her minor sons, were consenting parties to the deeds of 1258 and 1263 B. S.; the deed of 1249 B. S. which was executed between Boykuntonauth Roy and his brother Tarachand Roy, provides for a division of the estate, in case the family should not agree and live on good terms. This division took place in 1258 B. S. With reference to the important question whether the properties claimed, as derived by Chukinloll from his maternal relations, ought to have been included in the joint estate and made the subject of division, we observe that, though there is no proof of how, when, or from whom Chukinloll derived these properties, still the deed of 1249 B. S., corroborated by the deeds of 1258 and 1263, shows that these properties were excluded from the first-named deed, upon the basis of which deed the subsequent division was made. Tarachand, the father of the plaintiff, was a party to the deed of 1249 B. S., and it has been subsequently ratified by the brothers of the plaintiff and by his mother acting in her capacity of guardian to the minor sons of Tarachand.

Again Tarachand survived Boykuntonauth some years (he died in 1257); the division as by the terms of the deed of 1249 B. S. did not take place until 1258 B. S., or a year or so after the death of Tarachand. Neither Tarachand nor his heirs have shown us any proof whatever of possession of the properties claimed by Chukinloll as his separate estate, as held by them joint at any time from 1249 to 1258 B. S., in which latter year the division took place. We, therefore, are of opinion that these properties were properly excluded from the deed of 1249 and the division of 1258, and that they never formed a part of the joint estate.

On the third point, it is admitted that the family originally migrated from the Mithila province to the province of Bengal. The presumption is that they have adhered to the religious rites and customs prescribed by the *Mitacshara* law, unless the contrary be proved. The claimant has failed to show that the weddings or *shrads* in the family have at any time been performed according to the law and customs current in Bengal.

Occasional or daily religious observances may have been performed according to the customs of the latter law; but those ceremonies which are the real tests, such as marriages and funeral obsequies, have been performed according to the former law. The claimant has also failed to show us any instance in this family of a daughter or a son's daughter having inherited, although in her written statement she asserted that she was able to do so. As then this family is governed by

the rules of the *Mitacshara* law, the claimant who is the grand-daughter of Issurchunder Roy *can not* inherit any share of the estate, and she is, as ruled by the Principal Sudder Ameen, entitled to maintenance and to nothing further.

We dismiss both appeals and confirm the decision of the Principal Sudder Ameen. The (plaintiff) appellant, and the claimant (appellant) to pay costs of the respondents in proportion according to their respective appeals, with interest from this date to date of final realization.

The 12th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Sale by Grand-mother to Grand-daughter—Proof of bona fides.

Regular Appeals from a decision of Moulvie Ameerooddeen Ahmed Khan Bahadoor, Principal Sudder Ameen of Tirhoot, dated the 12th September 1861.

Case No. 472 of 1861.

Dabee Dutt Misser (one of the Defendants) *Appellant*,

versus

Bebee Alikoon-nissa (Plaintiff) and others (Defendants) *Respondents*.

Baboo Unnoda Persad Banerjee for Appellant.
Suit laid at Rupees 6,720.

Case No. 23 of 1862.

Shaikh Imdad Hossein *alias* Bundy and others (Plaintiffs) *Appellants*,

versus

Koonjoo Roy and others (Defendants) *Respondents*.

Moonshee Ameer Ally for Appellants.
Suit laid at Rupees 7,000.

Case No. 24 of 1862.

Shaikh Imdad Hossein *alias* Bundy and others (Plaintiffs) *Appellants*,

versus.

Bebee Alikoon-nissa and others (Defendants) *Respondents*.

Moonshee Ameer Ally for Appellants.

Suit laid at Rupees 6,720.

When a grand-daughter purchases from a grand-mother and attempts to oust a stranger who purchased *bonâ fide* and without notice, full and satisfactory proof of the *bona fides* of the transaction is necessary, even though no motive for fraud is proved.

THERE are in this case three appeals, two upon the merits, and the third as to costs only. In No. 472, Dabee Dutt is appellant, being a defendant below, and Alikoon-nissa and others (plaintiffs) are respondents. In No. 24, Imdad Hossein (plaintiff) is appellant, and Alikoon-nissa respondent. In No. 23, Imdad Hossein is the appellant, being plaintiff below, and Koonjoo Roy and others (defendants) respondents.

No. 472 is an appeal from the decision of the Principal Sudder Ameen of Tirhoot, in the original suit No. 13 of 1861. In that case Alikoon-nissa was plaintiff, and sued Shaikh Imdad Hossein and several others to set aside a certain alleged deed of sale and certain alleged powers of attorney, and for possession of a parcel of land No. 8.

The plaintiff Alikoon-nissa states that the parcels of land sued for, Nos. 1 and 2, were inherited by her from her mother, and the rest purchased by her from her mother Zumeeroon-nissa by a deed of sale dated the 6th January 1856; that she had possession of all except the parcel of land No. 8. Plaintiff states that she never executed any of the powers of attorney to sell, under which the property she sues for is alleged to have passed. Certain of the defendants calling themselves heiresses of Zumeeroon-nissa, supported the claim of plaintiff, under her alleged deed of sale from Zumeeroon-nissa. Dabee Dutt also sues on a deed of sale to him dated the 15th March 1856, from Zumeeroon-nissa. As regards these deeds, the Principal Sudder Ameen held that Alikoon-nissa's deed from Zumeeroon-nissa was a good one, but that the deed put forth by Dabee Dutt was not. As to the deed of sale set forth by Imdad Hossein, as given by Alikoon-nissa to him and dated the 30th March 1857, the Principal Sudder Ameen holds that deed to be invalid. It may be here remarked that one Kulub Hossein claimed to have purchased the right and interest in a part of the property, by a transfer to him under a deed of sale given by Imdad to Vilayet Hossein, which last deed, it is alleged, was executed under a power from Alikoon-nissa, dated the 25th November 1837. The former deeds of sale dated the 30th March 1857 and 17th July 1858, referring to this transaction, were held by the Principal Sudder Ameen to be invalid. Thus Alikoon-nissa, as plaintiff, obtained a decree for possession, and the cancelment of the deeds above detailed considered by the Principal Sudder Ameen to be invalid.

Imdad Hossein, in the suit in which he was plaintiff, averred that he had purchased the property for which he sued, from Alikoon-nissa, under a deed of sale of the 30th March 1857, and by one from Akbalooddeen dated the 5th May 1858, and he sued to cancel a deed of sale dated the 5th May 1858, purporting to be from him (Imdad) on account of the same property, which he alleges has been falsely set up by one Koonjoo Roy.

The Principal Sudder Ameen held that neither the plaintiff Imdad Hossein's deed of sale dated the 30th March 1857 from Alikoon-nissa, nor the power above adverted to as purporting to have been given by Alikoon-nissa to a mooktear for

the purpose of effecting the sale in question, was proved.

The Principal Sudder Ameen did, however, consider that portion of the plaintiff Imdad Hossein's claim, which was based on the deed of sale from Akbalooddeen, to be valid. An appeal on that point is before the Judge.

We have heard the Counsel on all the appeals to this Court. The appeals of Dabee Dutt Misser and Imdad Hossein are of the same character, *viz.* that the execution of their respective deeds of sale, and of the powers from Alikoon-nissa under which these deeds of sale were executed, the payment of the consideration-money, and possession of the appellants, were all clearly proved.

The pleader for Imdad Hossein urges that the power of the 27th March 1857, and the deed of sale of the 30th of that month, and the assignment from Alikoon-nissa to John Gale to pay rent to Imdad, were in original registered, and are duly proved.

The reasons given by the Principal Sudder Ameem for distrusting the alleged deed of sale put forth by Imdad Hossein, dated the 30th March 1857, and the power of the 27th March 1857, are these: *i. e.* that the power, under which the deed purports to have been executed, did not bear the seal or signature of Alikoon-nissa, and was executed in the office of the Cazee merely on the intimation of two persons to the effect that Alikoon-nissa had executed the power, and that although these two persons and two others, one of whom stated he was the writer of the power, deposed to its being a deed of a genuine and authentic character, still no act of Alikoon-nissa herself was shown in connection with the execution.

Now against these reasons it is urged before us, that it is customary for the powers of females to be executed and registered as this power is alleged to have been. But although the pleader puts in at this stage other powers of this character, he does not show us that any property passed under them.

On the whole case, we cannot find that the Principal Sudder Ameen was wrong in coming to the conclusion that the instruments were not genuine.

The evidence as to any purchase-money really passing is very unsatisfactory, and, in fact, the vendor is not in any way shown to have received it. Great reliance, however, is put upon the registration by the Cazee, of the power. Now there is only one witness who deposes to having seen Alikoon-nissa give the power; and the registration by the Cazee, on the information of other parties, certainly does not, under such a failure of direct evidence, afford reliable proof of the *bonâ fide* character of the transaction.

We have now to advert in these cases to Koonjoo Roy's deed of the 5th May 1858, from Imdad Hossein. That deed was set aside, inasmuch as Imdad, having been held to have no right of property under his alleged deed from Alikoon-nissa, would have no right to transfer such property to Koonjoo Roy or to any other person. Koonjoo Roy, however, has not appealed, and it is not necessary, therefore, to do more than advert to this second transaction. The same remarks apply to the decision in the case of Vilayet. His deed was set aside on the same grounds as that of Koonjoo Roy, and it is to be observed that Vilayet also has not appealed to this Court. We may notice that it is wholly unimportant to Alikoon-nissa whether the deeds of sale propounded by Koonjoo Roy and Vilayet be set aside or not, because if by Imdad's alleged deed of sale from Alikoon-nissa no property of the latter passed to the former, then no injury could accrue to Alikoonnissa from the deeds set up by Koonjoo and Vilayet. If, however, they had been really interested in the case, they might have appealed; Koonjoo, it must be noticed, is a servant, and Vilayet a relative of Imdad.

It still remains to be seen whether the case of Dabee Dutt is not a good one. It was held by the Principal Sudder Ameen, that Dabee Dutt's deed must be set aside, being of a date subsequent to Alikoon-nissa's purchase from Zumeeroon-nissa. The Principal Sudder Ameen remarks that the witnesses cited to prove Dabee Dutt's case were friends and dependants. Now, we may fairly suppose that, in transactions of the nature of those at present under our view, a purchaser would wish his own friends to be present, and to be available thereafter in case of necessity as witnesses: because to have no security of this kind would be equivalent to a purchaser leaving himself at the mercy of a vendor and his dependants. This part, therefore, of the reasoning of the Principal Sudder Ameen is, in our opinion, inconclusive and weak.

What then are the prominent facts proved in respect to Dabee Dutt's case? The conveyance by Zumeeroon-nissa to Dabee Dutt is satisfactorily proved. The only question is, was there a real prior purchase by Alikoon-nissa from Zumeeroon-nissa? On the one hand, Dabee Dutt has shown that he gave valuable consideration, and paid off mortgage-debts and bond-debts of Zumeeroon-nissa. He also got the mortgage deed, which was prior to Alikoon-nissa's purchase. Thus even supposing the Principal Sudder Ameen to be correct as to the fact of Dabee Dutt's conveyance being in point of time subsequent to Alikoon-nissa's purchase, still Dabee Dutt would have, even as against Alikoon-nissa, the equities of the mortgagee whom he had paid off. To this extent the Principal Sudder Ameen was wrong to say that Dabee Dutt, as subsequent purchaser, could have no interests superior to those of Alikoon-nissa.

On the other hand, was Alikoon-nissa's alleged purchase from Zumeeroon-nissa a *bonâ fide* one, or merely colorable and benamee? Alikoon-nissa is grand-daughter of Zumeeroon-nissa. Purchases of this nature between parties in these relations are to say the least improbable and require strong proof, whereas no money is shown to have passed from the grand-daughter to the grand-mother. Rupees 3,000 are said to have been paid by the

grand-daughter. The statements of the two witnesses who depose on this point are conflicting: one saying that he saw the cash transferred, the other that the consideration was passed by transfer of deeds. It is now pleaded that no motive for fraud is proved. It is not for us to say what the motive may have been; but it is for us to say that, when a grand-daughter purchases from a grand-mother, and attempts to oust a stranger who purchased *bonâ fide* and without notice, the Court must require full and satisfactory proof of the *bona fides* of the transaction, and certainly we have not such proof in respect to the alleged purchase for value by Alikoon-nissa from Zumeeroon-nissa.

This being our view of the facts of these cases, we hold *first*, that the Principal Sudder Ameen's decision setting aside the deeds of sale of Imdad and Koonjoo Roy and Vilayet Ali, must be upheld, and that appeal No. 24 of 1862 be dismissed with costs and interest.

We hold *secondly*, that Dabee Dutt's deed of sale and right to the property conveyed to him, must be upheld, and that the Principal Sudder Ameen's decision to the contrary must be reversed, and that Dabee Dutt Misser be allowed his costs on the same count, and interest at 12 per cent. on those costs from the date of the decree of the lower Court, also the costs of appeal No. 472 of 1861, and interest on those costs from this date until paid.

In the appeal No. 23, the question of costs is all that we have to decide.

Now the pleadings in that case were to this effect. Imdad sued to set aside a deed, which Koonjoo Roy set up, alleging that Imdad had executed it. Imdad pleaded that he had not done so, and also pleaded that he had got the property under a deed of sale from Alikoon-nissa, and Imdad makes Alikoon-nissa a party. Now whether Koonjoo Roy was right in saying that he bought from Imdad, or Imdad right in saying that he did not sell to Koonjoo, though a material point in the case between them, was an immaterial point in respect to Alikoon-nissa, for if Imdad's statement was found to be true and Koonjoo's false, or *vice versâ*, Alikoon-nissa could not have been affected by the result. Alikoon-nissa, therefore, was unnecessarily dragged into the case and was entitled to have her costs. The Principal Sudder Ameen's decree is, therefore, correct in awarding costs to her. Imdad's present appeal is not on the merits in respect to the order of the Principal Sudder Ameen as to Koonjoo Roy's deed, but solely as to costs. It only remains to dismiss that appeal for the reasons just given. It was at the last moment suggested that Imdad might amend his appeal, but this could not well be done in the absence of Koonjoo Roy who has not appeared, and whom it would have been necessary to summon. He might not have considered it worth while to appear, as the appeal of Imdad stood only on costs, but his pleas on the re-opening of the question of his deed of sale might have been quite different. Be that as it may, we are clear that the conduct of Imdad, throughout these transactions is not such as to deserve indulgence, being in our view that of a person supporting a fraudulent deed. Appeal No. 23 must be dismissed, and Alikoon-nissa must be decreed her costs of that appeal, and interest from that date. Koonjoo Roy not having appeared will not be entitled to the costs of the appeal.

We will add that the decision in these cases cannot be taken as evidence against such of the creditors of Imdad as are not parties to the suit.

The 14th February 1863.

Present:

The Hon'ble C. B. Trevor, W. S. Seton-Karr and L. S. Jackson, *Judges.*

Mortgage (Usufructuary)—Conversion—Agreement—Redemption.

Regular Appeals from a decision of Mr. L. Martin, Judge of Tirhoot, dated the 31st October 1859.

Case No. 30 of 1860.

Tewaree Loll and others (Defendants) *Appellants,*

versus

Kasseenauth and others (Plaintiffs) *Respondents.*

Baboos Romanauth Bose and *Dwarkanauth Mitter* for Appellants.

Baboo Kishen Kishore Ghose for Respondents.

Case No. 63 of 1860.

Kasseenauth and others (Plaintiffs) *Appellants,*

versus

Bheekareeloll and others, (Defendants) *Respondents.*

Mr. R. T. Allan and *Moonshee Ameer Ally* for Appellants.

Baboo Dwarkanauth Mitter for Respondents.

Suit laid at Rupees 83,560-8*a*.-6*p*.-5*k*.

When the original transaction is a usufructuary mortgage, the mortgagee is entitled to nothing beyond the repayment of his principal and interest from the usufruct of the property. The Court will not allow additional advantages to be obtained, through the necessity of the debtor, by the conversion of a mortgage into a transaction of a different nature. Once a mortgage, always a mortgage, is a principle not to be departed from. Consequently an estate mortgaged is always redeemable.

Plaintiffs, Kasseenauth and others, sue defendants, Bunwarree Loll and others, for the recovery of possession of the villages Rageghola and Modhurputtee mortgaged to the defendants, with mesne profits of the same.

Plaintiffs allege that, for the sum of Rupees 34,001, they, on the 6th May 1833, executed a deed of sale of the villages now in dispute to the defendants, Bheekareeloll and others, who on their part, on the 20th May 1833, or 3rd Jeyt 1240, executed an ikrarnamah, promising to

re-convey the property to the plaintiffs, if they paid the sum borrowed, with interest, on or before the 27th Bhadro 1255, or August 1848, that is within 15 years, 3 months, and 17 days, from the date of the execution of the deed of sale; that on the 21st of the same month, *viz.* May 1833, the defendants advanced to them a further sum of Rupees 3,750, for which formal documents were inter-changed with the defendants, acknowledging on the one side the payment, and on the other, a receipt of that sum; that defendants have been in possession and realized from the usufruct of the property more than the principal of the debt Rupees 37,500, with interest; hence the present suit.

The defendants plead 1*st*, that the original transaction was an out-and-out sale and not a mortgage, as is evidenced by the ikrarnamah executed by them, dated 20th May 1833, and consequently, the present suit is barred under the Statute of Limitation; that again, the ikrarnamah of 20th May was made null and void by the term of the ikrarnamah executed by the plaintiffs on the 21st May, who covenanted that if the money they advanced, *viz.* Rupees 3,750, be not re-paid within the time specified in that deed, the stipulations of the first deed (be they of whatsoever nature they might) are to be no longer in force; and that, as the payment was not made within that time, any claim founded on the first deed has become a nullity. Moreover, the examination of the accounts, admitting the transaction to be a mortgage, will show that their claim has not been discharged from the profits of the villages.

The Judge was of opinion that the original transaction as to the Rupees 34,001, between plaintiffs and defendants, was a mortgage, and, therefore, the suit was not barred; that, moreover, the subsequent transaction as to the Rupees 3,750 was a mortgage also, that is, an addition to the original debt was thereby made, as security for which the original mortgage was granted. That this is the nature of the second transaction, defendants have, by their own acts, admitted, for they have sued, though unsuccessfully, in consequence of certain irregularities in the notice of foreclosure, in which Rupees 34,001 was entered in the room of Rupees 3,750, for the confirmation of their possession under the second ikrarnamah. On the question of account between the parties, the Judge observes that the vakeels of both parties, in presence of the Court, mutually agreed to accept, as data for the adjustment of mesne profits, the account furnished by Toolseram Ameen. The result of the adjustment is that, after deducting interest at 12 per cent on the principal of the debt, that is Sicca Rupees 37,750, or Company's Rupees 40,266, during the period of suit, the interest has entirely swallowed up the usufruct, leaving the principal of the debt still undischarged. The Judge, consequently, dismissed the plaintiff's claim for possession, on the ground that the mortgage, principal, and interest had not been satisfied out of the usufruct of the property, with all the costs of suit.

From this decision two appeals have been preferred to this Court, one by the defendants below, against so much of the judgment as declares the original transaction a mortgage and to be still in force, and the other by the plaintiffs against that part of it which declares that the principal of the mortgage is still unsatisfied.

On the part of the defendants it was urged by Baboo Dwarkanauth Mitter, that an absolute conveyance cannot be converted into a mortgage by agreement subsequent; that consequently the absolute sale of the property made on the 6th May, could not be converted into a conditional sale or mortgage by the ikrarnamah of the 20th. In support of this argument the pleader cited Coote on Mortgage, page 21, wherein it is observed, "that equity looks to the substance and not to the form of things, and, therefore, on the one hand it considers a purchaser after an agreement for an absolute sale the actual owner before conveyance, and on the other hand, when the agreement is for a mortgage, it considers the mortgagor the actual owner after conveyance; that, consequently, as soon as the agreement for an absolute sale is executed, and the consideration paid, the vendor is in equity a stranger to the estate, and any subsequent transaction between him and the purchaser, cannot, it should seem, have the effect of divesting the ownership from the purchaser, and re-vesting it in the original vendor without the intermediate step of a re-purchase to the vendor." It was moreover urged, on the part of the defendants by their pleader, that even if the original transactions were a mortgage, it had become of no effect by the second ikrarnamah, dated the 21st May, executed by the plaintiffs, which was in fact an hypothecation of his remaining equity of redemption, and which, at the expiry of the period mentioned in it, made both the first ikrarnamah and the second null and void as against defendants.

On the part of the plaintiffs it was contended that the accounts upon which the Judge had relied were not trustworthy, and that the principal and interest of the other debt to the defendants had been more than satisfied from the usufruct of the property.

This case was before the late Sudder Court* on the 26th November 1851, and was for technical reasons then dismissed, but so as not to deprive the plaintiffs of the power of proceeding afresh, should they think fit, upon correct averments as to the amount actually received by them; the Court, moreover, remarked that any objections of law as to the effect of the second instrument of 21st May 1833, in converting the sale from a conditional to an absolute one, or the like, which have not been decided in this appeal, will of course remain open between the parties.

The plaintiffs in the previous case, whilst admitting the ikrarnamah executed by them on the 21st May, denied that they had received the Rupees 3,750 mentioned in it. The lower Court found that they had received the same, and they,

* Decisions for 1851, pages 685, 692.

therefore, in the present suit, admit that fact, and add this sum to the Rupees 34,001 borrowed under the previous alleged mortgage by them.

Taking up the defendant's appeal first, we would observe, that there can be no question as to the correctness of the doctrine cited by the pleader from Coote on Mortgage, namely, that an absolute conveyance cannot be converted into a mortgage by agreement subsequently, but that doctrine is altogether inapplicable to the circumstances of the present case. Here we have no absolute conveyance subsequently converted into a mortgage by an ikrarnamah or agreement, but we have an ikrarnamah which happens to have been made on a subsequent date, in consequence of an absence of the proper stamp at the time of writing the deed of sale, and which, moreover, recites that it is to be read as if executed on the 6th May, simultaneously with the deed of sale. In the face of this document, signed by the defendants, it is futile for them to argue that the execution of the ikrarnamah was an agreement subsequent. The terms of the agreement were a simultaneous transaction with the sale; the record of that agreement happens to be from accidental circumstance a few days later in date, but this difference of date cannot alter the nature of the original transaction between the parties as understood by both of them, and that was clearly a mortgage.

But even if the original transaction be a mortgage, it is contended by the defendant's pleaders that it has become as if it had never been by the terms of the ikrarnamah, on the 20th May 1833, executed by the plaintiffs, by which, if the sum of Rupees 3,750 be not paid within two years, both the deeds are to be null and void against the defendants.

The original transaction we hold to be a usufructuary mortgage. Such being the case, the mortgagee is entitled to nothing beyond the repayment of his principal and interest from the usufruct of the property, and the Court will not allow additional advantage to be obtained, through the necessity, it may be, of the debtor, by the conversion of a mortgage into a transaction of a different nature. Once a mortgage, always a mortgage, is a principle not to be departed from, and being a mortgage, an estate mortgaged is always redeemable, and the law will contest even an express agreement of the parties, and will let a man loose from his agreement and admit him to redeem a mortgage. Coote on Mortgage, page 11.

Guided by these principles, we should altogether refuse to allow a person by the non-payment of Rupees 3,750 in two years to shut himself and to be shut out of the power of redeeming his estate mortgaged for Rupees 34,001, within a term of fifteen years expressly allowed for redemption, and to give the effect to the ikrarnamah of the 20th May contended for by the defendants' Counsel. But looking to the terms of the ikrarnamah dated the 21st May executed by the plaintiffs, we think that, on the whole, the instrument may be fairly construed as only giving defendants a security for the additional sum borrowed under it, that security being the continued tenure of the estate already held by them as security for Rupees 34,001. In giving this interpretation to the deed, the Court reconcile the claims of the mortgagor and the mortgagee, with what the principles above laid down require.

We, therefore, coinciding entirely in the view which the Judge has taken of the transaction between the parties, dismiss the defendants' appeal with costs.

As to the plaintiffs' objections against the accounts upon which the Judge's decision is based, they seem to us to be baseless. A most careful local enquiry was made, and according to the agreement of both parties, the case has been settled in conformity with the return made by Toolseeram Ameen. The objections urged against the charge of interest is as baseless as those made against the Mofussil Returns; and as the memorandum of principal and interest drawn up by the Judge, is prepared in strict accordance with law and precedent, we see no reason for interfering with the judgment of the Judge, but dismiss the appeal with costs.

The 19th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, and F. B. Kemp, *Judges.*

Resumption (of Lakheraj)—Jurisdiction (of Collector)—Onus probandi—Special Appeal.

Case No. 1914 of 1861.

Special Appeal from a decision of Mr. E. F. Lautour, Officiating Judge of Behar, dated the 12th July 1861, reversing a decree of Mr. W. J. Longmore, Collector of that District, dated the 3rd June 1861.

Maharanee Inderjeet Koonwur (Plaintiff) *Appellant,*

versus.

Chokew Sahoo (Defendant) *Respondent.*

Moonshee Ameer Ally and *Moulvee Aftaboodeen Mohamed* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

A suit to resume a lakheraj tenure under Section 28 Act X of 1859 will not lie upon the ground that the tenure is invalid, but merely upon the ground that the lakheraj was granted after 1st December 1790; and the *onus probandi* in such case is on the plaintiff.

A special appeal will lie if the decree and judgment taken together show that the decision is erroneous.

In this case the plaintiff sued to resume a lakheraj tenure, under Section 28 Act X of 1859. Such a suit cannot be maintained upon the ground that the tenant holds under an invalid tenure, but upon the ground that he holds under a tenure invalid for the reason mentioned in Section 10 Regulation XIX of 1793, *viz.* "that

the grant under which he holds was made since 1st December 1790."

To obtain relief under Section 28 of Act X of 1859, the plaintiff must prove that the tenant holds under such a grant. In this case the Collector found that he held under a grant purporting to have been made prior to 1790, but that the alleged grant was not genuine; and he gave a decree for resumption in favor of the plaintiff. The Judge on appeal stated in his judgment that there were strong grounds for believing that the alleged grant was valid; and that as the plaintiff had failed to prove that defendant held under an invalid tenure, the decree of the lower Court was wrong, and he reversed the order of the Collector with costs payable by the respondent. The Judge was wrong in stating that the plaintiff was bound to prove that the defendant held under an invalid tenure; but he ought to have stated that the plaintiff was bound to prove that the defendant held under a tenure which was invalid upon the ground that it was granted since 1st December 1790, and that having failed to do so, the Collector ought to have decreed in favor of the defendant, leaving the plaintiff to proceed by a regular suit for resumption.

It is now contended before us, on behalf of the respondent, that the decree of the Judge was right, and that the decision of the Judge would not be binding as to the validity of the Sunnud in a regular suit for resumption instituted in the ordinary Civil Court But we think that the Judge has substantially found, in his judgment, that the plaintiff has failed to show that the defendant held under a grant made subsequent to 1790, because he held under a grant made prior to that date, and that that grant was valid. If the judgment and decree be allowed to stand, a Court of ordinary Civil Judicature would probably consider itself bound by the Judge's decision as to the validity of the grant. Looking at Sections 372 and 373 Act VIII of 1859, we think that the plaintiff has a right to appeal specially against the decision of the lower Court, if the decree, as explained by the judgment, is erroneous, for by Section 372 it is enacted that "a special appeal shall lie from all *decisions* passed in regular appeal" by the subordinate Courts, and not merely from all *decrees*. Section 373 says that the application for appeal shall be accompanied by copies of the *judgment and decree* of the lower Court; and Section 376, which speaks of reviews of judgments, uses the words "decree" and "judgment" in such a manner as to lead us to think that by the word "decision" the Legislature meant the decree and judgment taken together, and not simply the decree unexplained by the judgment.

For the above reasons, we think that the appeal ought to be decreed with costs; that we ought to give the same decree as the Judge ought to have done, *viz.* to reverse the decision of the Collector with costs, upon the ground that the plaintiff failed to prove that the defendant held under a grant made since December 1790; and, consequently, failed to prove that the case was one in which jurisdiction was conferred upon him by Section 28 Act X of 1859; leaving the plaintiff to file a regular suit under Section 30 Regulation II of 1819, in which the validity of the grant set up by the defendant would be investigated and determined.

The appeal is decreed without costs, and the decree of the Collector reversed. The costs of both the lower Courts to be paid by the plaintiff, the present appellant.

The 19th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, F. B. Kemp, and L. S. Jackson, *Judges.*

Adjustment of Account (Proof of).

Case No. 822 of 1862.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Additional Judge of Dacca, dated the 1st February 1862, reversing a decree of Moulvee Mahomed Nazim Khan Bahadoor, Principal Sudder Ameen of that District, dated the 13th July 1861.

Poornima Chowdhrain and others (Plaintiffs) *Appellants,*

versus

Nittanund Shah and others (Defendants) *Respondents.*

Moonshee Ameer Ally and *Baboo Onoocool Chunder Mookerjee* for Appellant.

Baboos Dwarkanauth Mitter and *Sreenauth Doss* for Respondents.

The adjustment of an account may be proved by verbal evidence, and need not necessarily be in writing signed by the party to be bound.

In this case the plaintiff sued upon an adjusted account. The first Court held that the plaintiff had proved the adjustment of the account. The Judge reversed that decision upon the authority of two cases decided in the late Sudder Court, *viz.*, Ramgopal Nundee *versus* Sreeram Putnaick, December 1859, p. 1228—and Bhoopnarain Sahoo *versus* Shogolan Sahoo, Sudder Decisions 1852 p. 594. In the latter case, the Court referred to a decision in the Privy Council (Soorabjee Vacha Ganda *versus* Koomarjee Manickjee, 1st Moore's Indian Appeals 47); but all that was decided in that case was that one party could not bind the other party by an adjustment made himself alone in his own books. In that case there was no evidence whatever to show that the defendants had adjusted or acknowledged the correctness of the account. We are of opinion that the adjustment of an account or the acknowledgment of its correctness may be proved by verbal evidence in the same manner as any other fact; and that the Judge was wrong in point of law in holding that the adjustment could not be proved except by an acknowledgment in writing, or by a signature or visible mark. The Judge was, no doubt, right in acting upon the decision of the late Sudder Court; but we think that those cases were erroneously

decided. The case must, therefore, be remanded to the Judge to try whether, in fact, there was any adjustment or not. We entirely agree with the two learned Judges who reserved this case for the opinion of a Full Bench.

The 19th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, F. B. Kemp, and L. S. Jackson, *Judges*.

Special Appeal—Order relating to execution of decree.

Case No. 300 of 1862

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 9th April 1862, *affirming an order passed by the Principal Sudder Ameen of that District, dated the 14th March* 1862.

Mahomed Hossein, *Petitioner.*

versus

Sheikh Afzul Ally, *Opposite party.*

Moonshee Ameer Ally and *Moulvie Aftaboddeen Mahomed* for Petitioner.

Messrs. G. and *C. Gregory* for Opposite party.

Under Section 11 Act 23 of 1861, a special appeal will lie from a decision passed in appeal from an order relating to the execution of a decree.

The question which has been reserved for the consideration of a full Bench, is whether a special appeal will lie from an order regarding the execution of a decree passed by the Principal Sudder Ameen, and confirmed on appeal by the Judge. One of the learned Judges (Mr. Justice Campbell) thinks that a special appeal will lie; the other Judge (Mr. Justice Steer) thinks that it will not.

We are of opinion that, reading Act XXIII of 1861 and Act VIII of 1859 together as one Act, a special appeal will lie from decisions passed in appeal under Section 11 of Act XXIII of 1861.

Section 364 of Act VIII of 1859 enacts, that "no appeal shall lie from any order passed after decree, and relating to the execution thereof, except as is hereinbefore expressly provided." Section 283 is the Section referred to by the words "except as is hereinbefore expressly provided;" and it enacts that "all questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, shall be determined by order of the Court executing the decree, and not by separate suit; and the order passed by the Court shall be open to appeal."

This Section, it appears, was considered by the Legislature as not going sufficiently far; and, therefore, by the 1st Section of Act XXIII of 1861, it was altogether repealed. Section 364 of Act VIII of 1859, however, remains unrepealed. But, in lieu of Section 283, a new Section was inserted in Act XXIII of 1861, namely, Section 11, which provides for a much larger class of cases than was provided by Section 283. Section 11 enacts that "all questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, *and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree*, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

There is, therefore, an addition in Section 11 of Act XXIII of 1861, to that which was originally included in Section 283 of Act VIII of 1859. With that addition—the addition being "any other questions relating to the execution of a decree"—Section 11 of Act XXIII of 1861 was intended to be substituted for Section 283 of Act VIII of 1859; and Section 44 of Act XXIII of 1861 enacts "that this Act (*i. e.* Act XXIII of 1861) shall be read and taken as part of Act VIII of 1859." By taking the Act of 1861 and reading it as part of Act VIII of 1859, so far as this particular case is concerned, it is the same as if Section 283 had been struck out of Act VIII of 1859, and Section 11 of Act XXIII of 1861 had been inserted in its place; and it must, therefore, be read in conjunction with Section 372 of Act VIII of 1859. That Section (372 of Act VIII of 1859) enacts that, "unless otherwise provided by any law for the time being in force, a special appeal shall lie to the Sudder Court *from all decisions passed in regular appeal* by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case, which may have produced error or defect in the decision of the case upon the merits and on no other ground." We must consider then what is meant by the words "a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal." Nor is there any particular meaning to be attached to the words "*regular* appeal," which would have prevented a *special* appeal lying from an order passed under Section 283, or which would now prevent a special appeal from orders passed in appeal under Section 11 of Act XXIII of 1861. We think that the words "regular appeal" in Section 372, must mean a general appeal

i. e. an appeal which will lie on any ground of error, whether of fact or of law, in contradistinction to a special appeal which is limited to the particular grounds of errors pointed out in Section 372, and which may be, for this purpose, shortly described as errors in law. If this were not so, a special appeal would not lie from a decree passed on appeal under Section 332 of Act VIII of 1859, for that Section does not use the words "regular appeal," but merely the word "appeal" and in the same way as the word "appeal," was used in Section 283, and is now used in Section 11 of Act XXIII of 1861. Section 332 says—"Except when otherwise expressly provided in this or any other Regulation or Act for the time being in force, *an appeal* shall lie from the decrees of the Courts of original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts;" yet it is from decisions passed in appeal under that Section that most of the cases of special appeal which come before us arise.

There appears to us to be no reason why a special appeal should not lie from decisions in appeal passed under Section 11 of Act XXIII of 1861, as well as from decisions in appeal passed under Section 332 of Act VIII of 1859.

It has been very properly urged by the vakeel in support of the special appeal that, unless a special appeal will lie, there is no remedy against errors or defects in law in decisions passed by the first Appellate Court, inasmuch as Section 11 expressly provides that the questions therein mentioned shall be determined by the Court executing the decree, and not by regular suit, and allows an appeal from the order passed Now, difficult points of law may arise in the execution of a decree. It may be, as observed by the learned Judge, Mr. Campbell, that on the face of the proceedings there may be a glaring error in point of law in the decision of the Appellate Court, and yet there would be no remedy, if a special appeal does not lie. For instance, a decree might order that the debtor's child should be taken and sold in execution of the decree, and if the lower Appellate Court upheld that order, would not a special appeal lie to this Court? We do not put this case as one likely to occur, but merely to test the principle. We think that a special appeal would lie in such a case, just as much as in the case of a decree passed in what is ordinarily called a regular appeal. There is nothing in Section 372 which would prevent such an appeal, the words of that Section are very general—"*all decisions* passed in regular appeal." The words are not limited to *decrees* so passed, and apply equal to orders. It is certainly true that the words of Section 11 of Act XXIII of 1861 confine the appeal given by that Section to orders passed by the Court executing the decree, for it says that all the questions referred to "shall be determined by order of the Court executing the decree, and not by separate suit; and the orders passed by the Court shall be open to appeal." Therefore, it is only a decision of the Court pronouncing the decision with reference to the execution of a decree which is declared to be open to appeal. But then comes Section 44 of that Act, which in effect says that Section 11 shall be read in the same way as if it had been introduced into Act VIII of 1859. It must, therefore, be read together with Section 372 of the latter Act, which says that a special appeal shall lie upon the grounds mentioned therein, notwithstanding the wording of Section 11 of Act XXIII of 1861. We think that a right of special appeal was conferred by the effect of Section 372 of Act VIII of 1859 as much in cases falling under Section 283, as in those falling under Section 332; and that a special appeal now lies from an order in appeal under Section 11 of Act XXIII of 1861.

Section 257 of Act VIII of 1859, to which our attention was called in the course of th arguments, says that "such orders (*i. e.* an order confirming a sale) unless appealed from, *and if appealed* from, then the order passed on the appeal, *shall be final.*" Here it is quite clear that a special provision is made that an order confirming a sale, if not appealed from, or the order on appeal, if the first order is appealed from, shall be final. There being that express provision, it falls within the excepting part of Section 372, which says that, "unless otherwise provided by any law for the time being in force, a special appeal shall lie, &c." A special appeal will not, therefore, lie from an order under Section 257, as that is a case otherwise expressly provided by the particular Act; and there is a similar Section 269.

But the Legislature has not provided in a similar manner for cases falling under Section 11 of Act XXIII of 1861, or Section 283 of Act VIII of 1859, any more than for the cases falling under Section 332 of Act VIII of 1859. Those cases fall under the general law, and are not excepted from the provisions of Section 372. We are confirmed in our view that it was the intention of the Legislature that a special appeal should lie in certain cases, from orders, as well as from decrees, by Section 27 of Act XXIII of 1861. That Section speaks of special appeals from *orders*, as well as special appeals from *decrees.*

We think that the point which has been referred to us, must be decided in accordance with the view of the learned Judge who thought that, in cases of this description, a special appeal would lie.

The 21st February 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, H. V. Bayley, F. B. Kemp and L. S. Jackson, *Judges.*

Jurisdiction of Civil Court (Extortion)—Review of Judgment (Extension of time)—Reference of points of Law to High Court.

Case No. 422 of 1862.

Miscellaneous Appeal from an order passed by Mr. G. A. Pepper, Officiating Judge of Tipperah, dated the 30th May 1862.

Ramguttee Doss, *Petitioner,*

versus

Gholam Ahmed Khoudkar and others, *Opposite party.*

Baboos Prosunno Coomar Sein, Chunder Madhub Ghose, Kalee Mohun Doss and *Mr. H. Stainforth* for Petitioner.

Baboo Romesh Chunder Mitter for Opposite party.

A charge of extortion can be entertained in a Civil Court

A Judge has power to grant a review of judgment notwithstanding that a period, exceeding 90 days has elapsed.

Points of law may be referred under Section 28 Act XXIII of 1861.

There is no doubt that the decision of the lower Appellate Court is erroneous on a point of law. It is alleged that certain monies were extorted from the plaintiff by duress, and a suit was instituted to recover the monies so obtained. The Judge was wrong in saying that a charge of extortion could not be entertained in a Civil Court. He has not cited any authority in support of his decision, nor given any reasons. The decision, however, of the Judge, is final, the claim being to recover a sum of money not exceeding Rupees 500. We think that an application should be made for a review of judgment under Act VIII of 1859, and a copy of our judgment may be sent to the Court for its guidance.

We are of opinion that the Judge has power to grant a review of judgment, notwithstanding a period exceeding 90 days has elapsed, and as the delay has occurred in consequence of bringing the case before this Court, there is a sufficient reason why the time for making the application for review of judgment should be extended, and the review granted.

We may add that if the Judge feel any difficulty on a point of law when he comes to determine the case upon review of judgment, he may refer that point of law for determination by this Court under the provisions of Section 28 Act XXIII of 1861.

The 27th February 1863.

Present:

The Hon'ble C. Steer, W. S. Seton-Karr, and G. Campbell *Judges.*

Jagheers granted under Section 34 Regulation XII. 1805—Sequestration of, in execution of decree.

Case No. 521 of 1861.

Miscellaneous Appeal from an order passed by Baboo Tarrakant Biddyashagur, Principal Sudder Ameen of Cuttack, dated the 30th August 1861.

Shaik Zumeelooddeen Mahomed, *Petitioner,*

versus

Russick Chand Addy and others, *Opposite party.*

Moulvee Murhamut Hossain for Petitioner.

Baboos Juggadanund Mookerjee, Kishen Succa Mookerjee, and *Dwarkanauth Mitter* for Opposite party.

The rights and interests of a judgment-debtor in a jagheer granted under Section 34 Regulation XII. 1805 cannot be sold in execution of a decree. The Court should sequestrate the property and make the proceeds available during the life of the debtor for the payment of the money decreed (*dissentiente* Steer J).

Mr. Justice Steer.—In this case a decree-holder has put up to sale, and has sold. the rights and interests of his debtor in a jagheer. The jagheer is one conferred by law (Section 34 Regulation 12 of 1805) to the ancestor of the debtor. It is contended for the debtor that such a jagheer cannot be sold, and that the Lower Court, instead of selling it, ought to have attached it, and paid the debts of the defendant out of the proceeds. Whatever the nature of the jagheer may be—whether the jagheer was the absolute property of the original grantee, or whether his interest in it was only a life-interest—it is quite clear that the jagheerdars for the time being have some sort of rights and interests: and as a sale in execution of a decree is only a sale of rights and interests, the sale made in this case ought to be allowed to stand. It is no part of the present duty of the Court to decide whether the sale made in execution is one of the rights and interests of a party who is the absolute owner, or a sale of merely the rights and interests of one who owns but a life-interest in the estate. This is an important question which this Court has no right to determine in such a summary enquiry as the present. It is sufficient for the Court to know that the debtors have some rights; and as any sort of right may be made the subject of sale in execution of a judicial award, the present sale, which is and can only be a sale of that nature, should not be interfered with. If either party desire to know more particularly what the nature of the rights and interests are, they can resort to a regular suit for that purpose; but it would be quite out of place if this Court, sitting as a Court for miscellaneous appeals, were to enter into any question which does not necessarily arise; and it is not a necessary question to enquire what the exact nature of the jagheerdar's rights and interests are. As a sale of rights and interests, whatever they may be, I would confirm the sale and dismiss the appeal with costs.

Mr. Justice Campbell.—I dissent from my colleague's judgment in this case. I think that the Principal Sudder Ameen's expressions amount to a declaration that the land is alienable by sale, and that we are bound to decide whether that declaration was correct or not. I think that it was necessary to determine this point before the sale was allowed. It is not consistent with justice or policy to sell without enquiry the germs of future litigation. The ground is or ought to be, as far as possible, cleared before the sale is allowed—that is, preliminary objections to the alienation of the property should be, as far as possible, disposed of. It is not desirable, without disposing of such preliminary points, to expose for sale a mere gambling and speculative interest in prospective law-

suits—especially, where, as in this case, the rights of future generations are concerned, and an improper sale will not only give the purchaser an uncertain and doubtful interest subject to long future claims, but will also, by alienating the possession and transferring the use and dominion to a stranger, place the next heirs (of such according to their claims) in a much worse position than if they had succeeded their ancestor. I hold, therefore, that, on the one hand, the purchaser of these rights, under the declaration of the alienable character of the land cannot be held to his bargain, on the supposition that he may after all have got only a life-interest; and, on the other hand, that the rights and interests of the present possessor should not be sold till it is determined whether the property is or is not an alienable property. If it is not, I believe that the proper course would be to sequestrate the proceeds, not to submit to speculative sale a life-interest in the property. On the point then that, at this stage, we are bound to determine whether the property is or is not alienable, instead of leaving the question for litigation in future generations, I have a very decided opinion.

Coming then to the question whether the property can be alienated, there is, I think, more room for doubt, chiefly arising to my mind from the circumstance that it seems to be generally held that rent-free land held under hereditary grants is, in Bengal, an alienable property. If this land had merely been held under a Government grant to the donee and his heirs for ever, it may well be that the Executive Government having no power to create an entail, and the terms not very widely differing from those of other rent-free grants, the tenure might be held to be alienable. But in this case the grant being confirmed by an express law, the legal validity of which, whether to create an entail or to make any other settlement, is undoubted, upon consideration I am of opinion that a grant so made by law to a man and his heirs for ever is of the nature of a perpetual entail. The term is, I think, not used in an ordinary matter-of-course way to signify a complete grant, but is a grant to perpetuate the memory of political services to be continued in the family for ever. My principal difficulty in the way of this interpretation has been that it appears from the terms of the law that the land belonged to the person in whom the rent-free tenure was bestowed previous to the grant, being doubtless ordinary revenue-paying land. It might doubtless well be argued that the Government might assign the revenue, but could not give away the pre-existent zemindaree-rights. And if the grant had been an executive grant, it certainly would have been so. But as the matter in fact stands, I think that the Legislature having power to deal with property as it thinks fit, has, in the exercise of its superior and plenary powers, by law settled this estate, zemindaree and rent-free rights together in perpetual entail in the family of the jageerdar just as on a late occasion an estate as by law settled on the successors of a Parsee Baronet. I think therefore that the sale should be reversed, and the Lower Court directed to sequestrate the property and make the income available so long as the judgment-debtor lives or till the decree-holders are satisfied. That is certainly the course followed in such cases in other countries. The case must go before another Judge.

Mr. Justice Seton-Karr.—After hearing the arguments in this case, I have arrived at the same conclusion as Mr. Justice Campbell. I agree with what he says as to the expediency of defining what is bought and sold if possible, and of discountenancing or avoiding speculations of the kind indicated. If we can attain this object, I can have no doubt that the jagheerdar possesses tangible rights of some kind; but it is shown from the record that it has been the practice to realise from these jagheerdars by attaching the estate and applying the proceeds to the liquidation of their debts. This was done in 1827, 1843, and 1847. This should be done in this instance; the lower Court should sequestrate the property, and make the proceeds available for the payment of the decree till it is liquidated. The purchaser of the jagheerdar's rights may get back his purchase-money which is in deposit, and each party may pay his own costs in appeal.

The 28th February 1863.

Present:

The Hon'ble C. B. Trevor, F. B. Kemp, and L. S. Jackson, *Judges.*

Suit for mesne profits—Suit for money had and received—Appeal from order dismissing a suit for want of jurisdiction.

Case No. 96 of 1862.

Regular Appeal from a decision of Mr. L. S. Jackson, Judge of Nuddea, dated the 16th December 1861.

Kameekhapersad Mookerjee and another (Plaintiffs) *Appellants,*

versus

Mr. R. Larmour, Manager of the Bengal Indigo Company, and others (Defendants) *Respondents.*

Baboo Hurro Kalee Ghose for Appellants.

Messrs. R. V. Doyne and *R. T. Allan*, and *Baboo Sreenauth Doss* for Respondents.

Suit laid at Rupees 29,001-14*a.*-10*p.*

The lower Court dismissed the suit for want of jurisdiction on the ground that the suit was one for money had and received, the cause of action having arisen in Calcutta.

HELD by the majority of the Court (*dissentiente* Jackson J.) that the lower Court had jurisdiction; that the object of the suit was in fact to obtain from defendant L a share of the mesne profits which L had without authority (as alleged by plaintiff) paid to a third party; that, if L has so paid them to a wrong party, he is liable to pay them again to the party entitled to receive them, he himself being left to any

remedy which he may have against the person who has wrongly received them; and that the mere fact of the sum now sued for being identical in nature with that paid by L to defendant R, did not make this an action against R for money had and received from L to his use.

HELD also by the majority that the Judge's order of dismissal was equivalent to a non-suit under the old Code of Procedure; and by the new Code of Procedure (Section 33 Act VIII of 1859), if it appears to the Court that it has not jurisdiction, the plaint should be returned for presentation to the proper Court; and that an appeal from such on order is not an appeal contemplated by Section 348.

Justices Trevor and *Kemp*.—Kameekhapersad Mookerjee and Sarodapersad Mookerjee, plaintiffs, sue Mr. Robert Larmour, Manager of the Bengal Indigo Company, Rajendrochunder Newgee, and others, for the recovery of Rupees 29,001-14-10, being the amount of mesne profits with interest thereon, during the period of their dispossession from a certain talook.

Plaintiffs allege that the talook Dehee Doobra and others, bearing a sudder jumma of Rupees 14,441-13, is numbered 167 in the Collectorate, and is situated within the jurisdiction of the Civil Court of Nuddea; that, of this property, a *5a.*-6-2-2 share of the talook itself, *6a.*-13-1-1 share of the putnee talook, and 3 *annas* of the dur-putnee talook, in all fifteen annas, belonging to the former proprietor, the late Issureepersad Mustafee, were sold in execution of a decree of the Supreme Court, and purchased by Rajendrochunder Newgee, who again, on the 23rd Maugh 1254, sold 5½ *annas* of the property to their mother, Soorutmoye Dabea, and 1*a*-17-1½ to one Nobocoomar; that the Bengal Indigo Company was in illegal possession of the above properties previous to the above purchase, and subsequently down to the 3rd Falgoon 1259; that their mother died on the 2nd Srabun 1258, and that they severally attained their majority in Bysack 1260 and Assin 1264; that on their demanding from Mr. Larmour the payment of the mesne profits due for the period of his illegal possession, he answered that he had paid it to the defendant Rajendrochunder; that both have combined to defraud them of mesne profits due to them. They, therefore, sue both parties to recover this sum, with interest and costs.

The defendant Rajendrochunder Newgee, in his written statement, urges that the present suit is inadmissible as the matter has already become a *res-adjudicata* between him and the plaintiffs, and also that the present claim is barred by the Statute of Limitations; and on the merits, he stated that the deed of sale, dated the 23rd Maugh 1254, mentioned by the plaintiffs, and the ikrar of the same date, to which no allusion is made in the plaint, should be considered together; that according to the terms of the ikrar, the purchase was merely a conditional purchase, and under it the plaintiffs had no right to the mesne profits prior to the getting possession of the estate, as up to that date no right or profit of any sort was sold to the plaintiffs; that, by the terms of the ikrar, plaintiffs were bound to incur the expenses of conducting the law-suit necessary for obtaining possession of the property, but neither they, nor their guardian, have ever acted up to the above condition or incurred any expenses for the above purpose; that, consequently, plaintiffs cannot claim that advantage which defendants have reaped by the expenditure of their own money, and their present claim should be dismissed; and that, even if the claim be admissible, the accounts filed by the plaintiffs are all incorrect.

The defendant Mr. Larmour, in his statement pleads that the present matter is a *res-adjudicata*, and the suit inadmissible; that Rajendro Newgee, the auction-purchaser in the Supreme Court, sued Mr. Furlong, the former Manager of the Bengal Indigo Company, for mesne profits in the Supreme Court, and recovered from him Rupees 28,564, as being due to the 15-annas share; that the Bengal Indigo Company cannot again be sued for *5a.*-12½*g.* of the above 15-annas; that plaintiffs have claimed mesne profits from 1254 B. S., and the farm of the Bengal Indigo Company only commenced on the 2nd Jeyt 1255; that more than 12 years have elapsed since this cause of action up to the institution of the present suit, and that the Bengal Indigo Company have no concern whatever with their debt; that the accounts of the plaintiffs are erroneous, and much in excess of the amount collected, and the whole claim has been made simply with a view to annoy him, defendant.

The decision of the Judge is to the following effect:—"Rajendro Newgee, one of the defendants in these cases, purchased the right of Issur Mustafee over 15-annas of the talook Doobra at a Sheriff's sale, and subsequently disposed of one-half or 7½-annas to the plaintiffs in both suits in the property, *5a*-7½*.g* to the mother of Kameekhapersad, and 1*a.*-17½*g.* to Nobocoomar Dey. It was agreed between them by a bond of indemnity that the seller and the buyers should in common take all needful steps to obtain possession of the property, and that, if they are unsuccessful, Rajendro would refund to the others the purchase-money, Rupees 16,000, with interest."

"The parties were obstructed in gaining possession by the Bengal Indigo Company (Manager Mr. Furlong,) who had taken the property in farm, and a suit to obtain possession in the Principal Sudder Ameen's Court, was dismissed with costs, for reason of the pendency of proceedings in the Supreme Court to set aside the sale. Rajendro, as he says, then singly prosecuted to complete the needful measures to have the sale confirmed, and afterwards sued Mr. Furlong in the Supreme Court, for damages on account of his unlawful occupancy for 5 years, and recovered to the amount of more than Rupees 28,000."

"The purchasers now sue Mr. Larmour, the present Manager of the Bengal Indigo Company and Rajendro, apparently to recover the same wasilat. This, at least, is one reading of the plaint; but in fact, and as the plaintiffs' vakeel admits, the object of the suit is to obtain the proportionate shares of the amount recovered by action in the Supreme Court.

"This is obvious from the allegation in the plaint of collusion between the Bengal Indigo Company and Rajendro; otherwise the plaintiffs' course would have been to sue the Company for their proper shares of wasilat, leaving Rajendro out of the suit entirely. This being so, the suit becomes one simply for money had and received, and one, consequently, which, as the cause of action arose in Calcutta, and the defendant Rajendro also resides there, cannot be determined in the Zillah Court. It is unfortunate that the real aspect of the case was not perceived by the Principal Sudder Ameen before it had gone so far. As it is, I have no option, but to dismiss the suit with costs."

From the decision of the Judge an appeal has now been preferred to this Court by the plaintiffs below. They, through their pleaders, urge that the Judge has misconceived the nature of their case; that the suit is not one for money had and received, but for mesne profits against the party in wrongful possession, and along with him, Rajendro, inasmuch as it was apprehended that the defendant Larmour would plead payment to him, and consequently it was necessary to have him before the Court; that the terms of the plaint are clear as to the nature of the plaint, and the defendants in their answer comprehended its nature; that under these circumstances the answer of a vakeel should not be allowed to over-ride the plaint itself, especially when such answer given without a consideration of the consequence, leads to a nonsuit; that a suit like the present is, under the law and precedent of the Court, admissible, and it should, therefore, be remanded for trial on its merits.

The vakeel, on the part of the Bengal Indigo Company, supported the reasoning of the Judge as contained in his judgment which is set out above, and contended that the suit is inadmissible in the Mofussil Court.

Looking to the terms of the plaint as given above, we think that there can be no question that the suit is one for mesne profits against two parties, who have, it is alleged, fraudulently colluded to deprive them of the same; and under such allegation it was necessary not only that Larmour, the party in possession, and the principal defendant, but Rajendrochunder should be made a party to the suit. The defendants understood the plaint in this way, and have raised in their statement certain objections to the suit. Considering these objections and the plaint together, the real issues to be tried in this case are:—

1st.—Are the plaintiffs entitled to mesne profits under their agreement with Rajendro Newgee previous to the date of their acquiring possession of the property, or not?

2nd.—If they be, from whom are they entitled to receive them?

3rd.—What is the amount of the mesne profits to which they are entitled?

If the first issue be decided against the plaintiffs, their cases necessarily fall. If the first issue be in their favor, and the second issue be determined against the principal defendant Larmour, the amount of mesne profits will remain for consideration. Should, however, the defendant Larmour be released on the second issue, it will then remain for the Court to consider whether in the present suit a decree can pass against Rajendro or not?

As to the objection to the form of the suit based chiefly on the admission of the pleader of the plaintiffs before the Court below, to the effect that the object of the suit was to obtain the proportionate share of the amount recovered by action in the Supreme Court, we think it not tenable. The object of this action is, in point of fact, to obtain *from Larmour* a share of the mesne profits which Larmour, on plaintiffs' allegation, without authority, has paid to a third party. If Larmour has so paid them to a wrong party, he is liable to pay them again to a party entitled to receive them, he himself being left to any remedy which he may have against the person who has wrongly obtained them. But the mere facts of the sum now sued for, being identical in nature with that paid by Larmour to Rajendrochunder, and Rajendrochunder being a defendant in the present suit in consequence of his alleged collusion with Larmour, do not make this an action against Rajendro for money had and received by that person from Larmour to his use. Under this view, the words of the pleader, as cited by the Judge, in no way affect the nature of the suit; and even if they did, though, doubtless, it was quite competent to the Judge under the law to put any question to him connected with the case, we should hesitate before we allowed any answer given to such question to over-ride the terms of the plaint, clear as they are in the present suit, both as to the causes of action, the subject of the claim, and the relief sought for—in other words, before we, in short, allow an explanation elicited by the Judge to supersede words which require no explanation. On the whole, then, we are of opinion that the cases must go back to be tried upon the issues above laid down by us.

It was urged by Mr. Doyne, on the part of Rajendrochunder, that his client is entitled, under Section 348 of Act VIII of 1859, to the opinion of this Court, as to whether he was liable to the plaintiffs or not in this action, as now interpreted by the Court—a liability which is repudiated by his client. But we think there is no ground for this contention. The Judge has simply dismissed the plaintiffs' suit on the ground of want of jurisdiction. The simple question, therefore, before the Court is, then, has the lower Court on the face of the plaint jurisdiction, or has it not? We have decided that it has jurisdiction to try the cause, and having decided that point, we remit the case to the Court below, to deal with it in the usual way. The Section of the law cited by the learned Counsel does, not apply to a case of this nature. The Judge's order of dismissal is equivalent to a non-suit under the old Code of Procedure; and by the new Code of Procedure, Section 33 of Act VIII of 1859, if

it appears to the Court that it has not jurisdiction, the plaint should be returned in order that it may be presented to the proper Court. Now, an order non-suiting the plaintiff, or returning the plaint for want of jurisdiction, is not a decision in any proper sense of that term. It is simply a refusal to look at the case at all, and an appeal from an order involving such refusal, is consequently not an appeal contemplated by Section 348 of the Act, and any supposed right formed on the terms of that Section necessarily falls.

As the Section cited by the learned Counsel is, in our view, inapplicable to the present matter, it is unnecessary to pursue the subject further. The case will, as before remarked, go back to be tried on its merits.

Mr. Justice Jackson.—In this case, after full consideration, I retain the opinion which I formed as Judge of the Zillah Court; and although I might content myself with referring for the grounds of that opinion to the judgment which I delivered in that Court, yet I think it better, as well as more respectful towards my learned colleagues who have over-ruled me, to add to the former judgment some considerations which may set my opinion in a clearer light.

The plaintiffs' right of action (in two cases precisely similar) arose out of a contention between them (*i. e.* between the mother of Kanie Khapersad plaintiff in one suit, and Nobo Coomar plaintiff in the other suit) on the one hand and Rajendro Newgee on the other, by which Rajendro having previously purchased at a Sheriff's sale the right, title, and interest of Issurchunder Mustafee in certain landed property, agreed to sell one-half of what he had purchased, in unequal shares, to the two other contracting parties.

The seller was not at this time in possession, and of course could not deliver possession to the purchasers, but it was agreed between them by a separate deed that the seller and the purchasers should take jointly all needful steps, and share the needful expense for getting possession, and, in future, it was further agreed that, if they are unsuccessful in these proceedings, the seller would re-pay to the purchasers their purchase-money with interest.

The difficulties which the parties had to encounter, were of two kinds: the land was in possession of the Bengal Indigo Company which had got a farm and was holding over, although the term had expired; and the judgment-debtor was proceeding in the Supreme Court to have the Sheriffs' sale set aside.

By reason of the pendency of these last proceedings, a suit for possession brought by all the parties against the Bengal Indigo Company, was dismissed.

The proceedings against the sale were then successfully opposed by Rajendro Newgee unaided, who afterwards also succeeded in ejecting the Bengal Indigo Company, and recovered wasilat from them as damages in the Supreme Court to the extent of Rupees 28,000 and upwards.

The plaintiffs, purchasers, now sued, reciting as much of these circumstances as suited their purpose, alleging that the vendor and the Manager of the Bengal Indigo Company "had combined to defraud them of the mesne profits and their right of purchase."

They made both, therefore, defendants, and laid their suits at Rupees 29,001-14*a*-10*g*., and Rupees 9,667-4*a*.-16*g*.-2*c*.-2*k*., respectively, for wasilat with interest.

Mr. Larmour, as Manager, answered for the Bengal Indigo Company; *first*, denying that plaintiffs had any right to sue the Company; *second*, pleading that the claim was *res-adjudicata* by reason of the suit being previously dismissed in the same Zillah Court; *third*, pleading that the Bengal Indigo Company had already been obliged to pay wasilat for the same estate at the suit of Rajendro Newgee (in the Supreme Court), and could not be compelled to pay again.

He also objected to certain details of the account subjoined to the plaint.

Rajendro Newgee also put in a written statement in answer to the plaint. He pleaded limitation and other pleas in bar of the suit.

He further pleaded that plaintiffs not having contributed their share of the trouble and expense incurred in obtaining possession, were not entitled to anything but the re-payment of their purchase-money; had the plaintiffs, according to the agreement, been indebted to him for their share of the expenses incurred with interest also, yet they could not recover wasilat for a period prior to their possession.

The correctness of plaintiffs' account was impugned.

Rajendro likewise averred that he had recovered not mesne profits, but damages from the Bengal Indigo Company; and after some other pleas of minor importance, he prayed that plaintiffs' suit might be dismissed, and that the Court would order the payment by plaintiffs to him of the amount alleged to be due on account of expenses incurred, with interest thereon.

Now upon these allegations, it still appears to me that there could be no joint liability on the part of these defendants to the plaintiffs. That the combination or collusion between the defendants insinuated in the plaint, was a mere phrase employed to give color to the form of the suit, which, as it stood, involved a misjoinder of parties against whom the plaintiffs might have distinct causes of action, but not one common cause of action.

It seems that the plaintiffs' suit meant one of two things, namely, either a suit for mesne profits against the Bengal Indigo Company in which Rajendro Newgee could not be liable, or a suit based upon the contract against Rajendro, with which the Bengal Indigo Company would have no concern; and it may be surmised that the plaintiffs, not being quite sure which was their proper remedy, had sought to bring an action embracing both.

Issues in this case had been framed in the Court of Principal Sudder Ameen before it was called up to the Judge's Court; but if, on the suit coming to a hearing, it were found that the issues were insufficient, it was the duty of the Judge, under Section 141, to amend them, and with a view to such amendment, the Judge was at liberty to examine the parties or their pleaders under Section 125 of the Code of Civil Procedure.

In the present case there was an obvious necessity to amend the issues for the purpose of determining the real controversy between the parties.

Now, adverting to the two aspects in which I have already observed the plaintiffs' suit might be viewed, there appear to be two principal reasons for looking upon it as a suit against Rajendro under the contract, rather than a suit against the Bengal Indigo Company for mesne profits.

First.—That it did not appear from the plaint when the plaintiffs had got possession; that even if they got possession of the land so as to give them a title to sue for wasilat, Rajendro had the legal title under the Sheriff's sale. *Second*, that the Bengal Indigo Company had already been compelled to pay their mesne profits to Rajendro under a decree of the Supreme Court, while the rights of the plaintiffs and of Rajendro under the contract had not been adjudicated upon, and obviously required adjudication.

The Court, therefore, examining the plaintiffs' vakeel, put the question to him, whether this suit was not in fact a suit for the purpose of recovering from Rajendro the proportion due to the plaintiffs of money which he had recovered in the Supreme Court from the Bengal Indigo Company. I should observe that the answer of the vakeel was not to be looked upon as an explanation over-riding the palpable meaning of the plaint, but as the clearing up of what still appears to me an obvious, if not an intentional, ambiguity.

This question then, it appears to me, arose out of the pleadings; it was properly put to the pleader, and was answered by him without hesitation, in the manner most consonant with the real justice of the case.

He said that it was an action for that purpose; and from his answer, I think the judgment of the Zillah Court followed as a matter of course—the place of contract, the receipt of the money by defendant, and the residence of that defendant being all in Calcutta.

The majority of the Court have determined that the suit must be considered a suit for mesne profits; and upon their intimating this view of the case, Mr. Doyne, who appeared for Rajendro, asked the Court to order that the suit be dismissed as against his client. He was entitled, in my opinion, to ask this, as respondent, under Section 348 of the Code; and it seems to me that this Court might have so ordered.

Rajendro was not in wrongful possession of the land as against these plaintiffs, and I do not see how he can be liable to them in a suit for mesne profits. If this be so, I see no reason for sending the case to the Zillah Court for trial, as between him and the plaintiffs.

The 18th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, C. B. Trevor, H. V. Bayley, and L. S. Jackson, *Judges*.

Appeal (from decisions under Section 28 Act X of 1859)—To whom it lies.

Case No. 1988 of 1861 under Act X of 1859.

Special Appeal from a decision of Mr. E. F. Lautour, Judge of Behar, dated the 2nd August 1861, reversing a decree of Moulvie Mahomed Abdool Luteef, Deputy Collector of Aurungabad, dated the 5th April 1861.

Bissumbhur Misser and others (Plaintiffs) *Appellants*,

versus

Gunput Misser (Defendant) *Respondent*.

Baboo Unoocool Chunder Mookerjee for Appellants.

Moonshee Ameer Ally for Respondent.

The appeal from a decision passed under Section 28 Act X of 1859 lies to the Zillah Judge, unless the amount in dispute exceeds 5,000 Rs., in which case the appeal will lie to the High Court (*Dissentientibus* Raikes J. and Trevor J).

The Chief Justice and Justices Bayley and Jackson.—The point for consideration is, whether an appeal, from a decision passed under the provisions of Section 28 Act X of 1859, lies to the Revenue Commissioner or to the Zillah Judge. We are of opinion that the appeal lies to the Zillah Judge, unless the amount in dispute exceeds Rupees 5,000, in which case the appeal will lie to the High Court. The words used appear to us to be very clear. They state that the application made to the Collector under the provision of the aforesaid Section, is to be "dealt with as a suit;" and again, that "every such suit shall be instituted within the period of twelve years from the time when the title of the person claiming the right to assess the land first accrued."

The object of Section 28 was to prevent proprietors of estates from acting upon their own authority, without application to a Court of Justice. The words "shall make application to the Collector" were probably used in contra-distinction to the rule laid down in Section 10 Regulation XIX of 1793, by which it was enacted that parties might act without application to a Court of Judicature.

Section 101 Act X of 1859 refers to orders passed by the Revenue Authorities in their executive capacities, and not to judgments in suits or to orders passed in the course of suits. From any such judgment or order, the appeal lies to

the Zillah Judge and not to the Revenue Commissioner. Further, in Section 160 of the Act, it is enacted that in "all suits" other than those in which, when tried by a Collector, the judgment of the Collector is declared to be final, or when tried by a Deputy Collector, an appeal is allowed to the Collector, the appeal from the judgment of the Collector or Deputy Collector shall lie to the Zillah Judge or to the High Court.

This case does not fall within any of the exceptions noted in Section 160 of the Act.

We think that we should not be justified in putting such an interpretation upon the words above quoted from Section 28, as to say that it was the intention of the Legislature, that an application under that Section was to be dealt with as a suit as regards procedure, but not as regards appeals from decisions. This decision upon the point of law will be transmitted to the Division Court, for their guidance in finally determining the appeal.

Mr. Justice Trevor.—I adhere to the Court's ruling as given on the 7th November 1861.

I draw a distinction between the procedure inculcated by Sections 25, 26, 27, and 28, and that of suits under Sections 23 and 24 of the Act, because Section 34 prescribes, that "suits under this Act shall be instituted by presenting to the Collector a *plaint*, or statement of claim, which shall contain the name, description, and place of abode of the plaintiff; the name, description, and place of abode of the defendant, so far as this can be ascertained; the substance of the claim; and the date of the cause of action."

Whereas the form prescribed in Sections 25, 26, 27, and 28 is not by plaint, but by *application*, and though the application when made is to be "dealt with as a suit," or in the manner provided for suits under the Act, yet it is clearly not instituted as suits are instituted; and consequently the orders passed by the Collector are not judgments in suits, nor orders passed by a Collector in course of suit, and relating to the same thereof, or orders passed after decree and relating to the execution thereof, are, therefore, in my opinion, appealable under Section 151 to the Court of Revenue.

I would moreover remark that the procedure in the suits under this Act is specifically laid down in Sections 34, 35, 36, and following Sections, and the rules applicable respecting the nature of the suits referred to in Sections 23 and 24 are given in detail, while no further reference is made to such matters as are treated of in Sections 25, 26, 27, and 28. It appears to me that, if the matters therein referred to were intended to have been made the subjects of *suits*, some detail regarding the conduct of such suits would have been likewise given in the Act; whereas, while the causes of action detailed in Sections 23 and 24 are separately treated, no mention whatever is made either as to the conduct of an execution of decree in cases arising out of applications made under the other Sections.

As, therefore, the law does not contemplate that they shall be considered as suits, I do not think the orders applicable to judgments, and orders passed on suits, can apply to them; and I, therefore, adhere to the opinion previously expressed by the late Sudder Court on this point, on the 7th November 1861.

Mr. Justice Raikes.—After giving every attention to the opinion recorded by the majority of the Court, I adhere to the view of the law adopted by the Court, on the 7th November 1861. There are, it appears to me, without question, difficulties found in the wording of the law; and those difficulties seem to me to be unnecessary, by allowing the Collector and the ordinary Courts concurrent Civil jurisdiction. Whereas I consider an application under Section 28 not a suit, but a mere application, the action of the ordinary Civil Court is not interfered with by the concurrent jurisdiction. As, however, the majority is of another opinion, it is unnecessary for me to pursue the matter further.

The 26th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Eviction does not destroy holding—Presumption of occupancy from Permanent Settlement (not applicable as against an auction-purchaser under Act I of 1845.)

Case No. 202 of 1862.

Application for a review of Judgment passed by the Hon'ble Sir Barnes Peacock, Kt., and the Hon'ble H. V. Bayley, and F. B. Kemp, in Special Appeal No. 425, dated the 22nd August 1862.

Lutteefun-nissa Bebee (Appellant) *Petitioner*,

versus

Baboo Poolin Beharee Sein (Respondent) *Opposite party*.

Baboo Turucknauth Sein for Petitioner.

Mr. J. Cochrane and *Baboos Kishen Kishore Ghose* and *Juggadanund Mookerjee* for Opposite party.

If a ryot holding at a particular rent is unlawfully evicted, the holding does not necessarily cease to exist.

The presumption created by Section 4 Act X of 1859 cannot create a right against an auction-purchaser under Act I of 1845.

We must refuse to grant a review in this case. Mr. Cochrane has very properly contended that, if a ryot holding at a particular rent is unlawfully evicted, he does not necessarily cease to hold at that rent. We entirely concur with him in that view of the case. Eviction, though it would put an end to the ryot's possession, would not destroy his holding; and, therefore, if the ryot is restored to possession, he is restored to his original holding, if that holding would not have ceased to exist but for the eviction. But in this case our judgment turns upon a different ground. It is contended, on behalf of the defend-

ant, that he is entitled to the presumption created by Section 4 Act X of 1859. But the plaintiff is an auction purchaser under Act I of 1845. Section 26 of that Act enacts "that the purchaser of an estate sold under this Act, for the recovery of arrears due on account of the same, in the permanently settled districts of Bengal, Behar, Orissa, and Benares, shall acquire the estate free from all incumbrances which may have been imposed upon it after the time of settlement, and shall be entitled to enhance at discretion the rents of all under-tenures in the said estate, and to eject all tenants thereof, with the following exceptions."

One of the exceptions is that created by Clause first, namely, "tenures which were held as *istemrarree* or *mokurreree* at a fixed rent more than twelve years before the settlement." The presumption created by Section 4 of Act X of 1859 is merely "that the land has been held at that rent from the time of the Permanent Settlement." The presumption, therefore, will not be sufficient to c... a ...ht against an auction purchaser under Act I of 1845.

The review will be refused with costs, and interest thereon at 12 per cent.

The 30th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Sale of Putnee for rents – Purchase by defaulter not valid.

Case No. 70 of 1862.

Regular Appeal from a decision of Mr. A. Da... ..., Principal Sudder Ameen of Hooghly, dated the 12th December 1861.

Mirza Mahomed Nasser and Lootfunnissa Bebee (Plaintiffs) *Appellants,*

versus

Kishen Mohun Goyee and others (Defendants) *Respondents.*

Baboo Dwarkanauth Mitter for Appellants.

Baboo Taruckanauth Sein for Respondents.

Suit laid at Rupees 8,300.

A defaulter cannot under Regulation VIII of 181[illegible] purchase a putnee sold on account of his default to pay the Putnee rent, either in his own name or in that of any other person.

This is an appeal from the decision of the Principal Sudder Ameen of Hooghly, dated the 12th December 1861. The plaintiff Mirza Mahomed Nasser is the appellant; he sued to recover possession of a putnee property called "Lot ...," alleging that one Becharam Joee, colluding with certain ryots, purchased a small jote in the putnee, but would not pay the rents, on which being sued he was annoyed and fabri... ... a deed purporting to be a registered lease ... putnee for ... years, from 1255 to 126[illegible] ... 1st Poos 1255 as given by plaintiff to the defendant Kishen Mohun Goyee. Plaintiff then states that he had great difficulty in collecting his rents owing to the opposition of Kishen Mohun Goyee, and a case under Act IV of 1840 ensued, resulting in orders by the Magistrate on the 6th June 1849 and by the Sessions Judge on the 27th July 1849, that Kishen Mohun Goyee should be kept in possession and thus plaintiff has been dispossessed from the 6th of June 1849. Plaintiff adds that he once before sued to set aside these orders under Act IV of 1840, and to recover possession, but was non-suited. It is further stated in the plaint that Kishen Mohun Goyee, wishing not to rest his right only on so weak and temporary a deed as the fabricated lease, purposely contrived to default in the payment of his putnee rents, so that he might have the opportunity of purchasing, benamee, the putnee at the sale which would necessarily follow his default; and that he did so purchase it at such sale really for himself but ostensibly in the name of one Kalachand, his servant or a relative, and that, moreover, Kishen Mohun, still further to cover the fraud, caused Kalachand to transfer the putnee by a deed of private sale to the defendant Denobundoo, the son of another servant, who was also a benamee transaction, Kishen Mohun having really all the beneficial interest.

The defendant Kishen Mohun Goyee did not appear. The answers of Denobundoo and Kalachand are to the effect that, the putnee ... having been sold for arrears according to law, the sale could not be reversed upon the ... for recovery of possession as ... that the plaintiff could only sue for damages; that the purchase of the putnee at the sale for arrears by Kalachand, and the subsequent transfer by Kalachand to Denobundoo, were not benamee but real transactions; that as to the putnee sale, plaintiff was fully aware of the default; that plaintiff petitioned ... the ... not on account of its being benamee but as not resulting in adequate proceeds; and that the plaintiff himself took the benefit of the sale proceeds as they were paid out on his account in satisfaction of a decree in which plaintiff was the judgment-debtor, and one Gungaram was the judgment-creditor.

The lower Court held that the putnee was sold for arrears due by plaintiff; that, as plaintiff avers the lease to be a forgery, he cannot plead it, that under that lease Kishen Mohun and not he was responsible for those arrears; that in any case plaintiff might have protected his interests by paying in the balance due; that he did not do this, and that plaintiff's right in the putnee must be deemed to have ceased and determined from the time of the sale, and Kalachaund's and Denobundoo's rights to have possession could not be disturbed by plaintiff's suit, which was accordingly dismissed. The Principal Sudder Ameen did not in any way decide whether the purchases of Kalachaund at the putnee sale, and of Denobundoo by private sale were or were not benamee, or what the legal effect would be, if either or both had been so.

The plaintiff appeals here, and urges that Kishen Mohun really did purchase, benamee, at the putnee sale, in the name of Kalachaund, which he could not legally do; and that this fact invalidated any title alleged by Kalachaund under the putnee sale, or by Denobundoo under a private purchase from Kalachaund as Denobundoo's rights could not be valid if his vendor's were not so, or if this last transaction were also fictitious.

On a reference to the pleadings, it is quite clear that the plaintiff pleaded that Kalachaund's purchase at the putnee sale was only benamee for Kishen Mohun, and that plaintiff also pleaded that Denobundoo's purchase from Kalachaund was also benamee, and that Kishen Mohun was still really in possession, though originally he was wilfully the defaulter, on account of whose default the putnee sale took place. The decision of the Principal Sudder Ameen certainly does not adjudicate upon these pleas, and we think that they require adjudication. We have in this case Kishen Mohun as the party in possession of the putnee by the award of the Courts of Criminal Judicature, who were competent to make that award, nor was there any reversal of it by a Civil Court. Kishen Mohun was certainly the party, who, being thus legally in possession, was responsible for those rents. He certainly failed in paying those rents, and, therefore, it was his default which led to the putnee sale. It is further quite clear that Kishen Mohun, being the defaulter, could not, under Regulation VIII of 1819, purchase the putnee which was sold on account of his default either in his own name or in that of any other person. It follows then that if he did purchase in the name of Kalachaund at the putnee sale, as has been alleged in the pleadings and not adjudicated by the Principal Sudder Ameen, the purchase, although in Kalachaund's name, would give Kalachaund no valid title to the property, nor could Kalachaund pass it, with any good title under his deed of private sale, to Denobundoo; and further, if that deed of private sale were also a continuation of the benamee transactions, it would be of no avail to convey the property legally to Denobundoo. Thus if either the putnee sale or the private sale referred to, be valid, plaintiff's case falls; if, however, both are invalid, plaintiff is, in our opinion, entitled to recover the possession of the putnee property for which he sues. It must however, in this place, be observed that it is admitted that the surplus sale-proceeds were paid over in satisfaction of a judgment-debt of plaintiff.

Under this state of facts, we think that the justice of the case will be met by an order of remand for the trial and adjudication of the issues, whether the putnee and private sales referred to were one or both benamee, and that, if both were found to have been benamee, plaintiff should recover possession of the putnee on paying over to Kishen Mohun the surplus sale-proceeds which have gone to the satisfaction of the decree held by Gungaram against plaintiff.

Ordered that the case be remanded for retrial with reference to the above remarks.

The 30th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Rent decreed in a former suit—Notice not necessary—Former decree is Notice—Interest.

Case No. 141 of 1862 under Act X of 1859

Special Appeal from a decision of Mr. A. Pigou, Judge of Hooghly, dated the 16th November 1861, reversing a decree of Mr. W. R. Pogson, Deputy Collector of that District, dated the 27th April 1861

Ramjeebun Bose (Plaintiff) *Appellant*,

versus

Tripoora Dasee and others (Defendants) *Respondents*.

Baboos Dwarkanauth Mitter and *Aushootosh Dhur* for Appellant.

Baboos Kishen Kishore Ghose, Baney Madhub Banerjee, and *Sreenauth Doss* for Respondents.

A suit for arrears of rent at a certain rate decreed in a former suit, may be maintained without notice under Regulation V of 1812, the decree itself being held to be sufficient notice.

THE plaintiff sued the defendant in a regular suit for assessment of certain lands in his occupation, and obtained a decree fixing the jumma at Rupees 238-7 per annum.

The present suit was to recover the rent due from the date of decree fixing the aforesaid jumma, and the claim was for a period ranging from 25th Cheyt 1260 B. S., to the end of 1267 B. S., at the rate of Rupees 238-7 per annum.

The Court of first instance decreed the principal sum claimed, but did not award interest. The defendant appealed, as also did the plaintiff, the latter, under the provisions of Section 348 Act VIII of 1859. The Zillah Judge raised two issues—

1st.—Can the plaintiff obtain a decree for arrears of rent at an "enhanced" rate decreed in a former suit, without notice under Regulation V of 1812?

2nd.—If so, can he get the interest sued for?

The Judge observes, "that the late Sudder Dewanny ruled on the 13th May 1858, page 1001, that even though there be a decree of Court decreeing the right to enhance and rate of enhanced rent, yet, unless notice under Regulation V of 1812 were issued, a suit for arrears of rent at that enhanced rate will not lie," and that, as no notice was served in this instance, the plaintiff cannot recover the rent claimed. The decision of the Court of first instance was reversed.

We are of opinion that the decision of the Judge is erroneous, and that the precedent quoted by him is not applicable to the present suit. The decree of the Principal Sudder Ameen fixed the rate at which the defendant was to pay rent to the plaintiff, but the rate was *not an enhanced*

rate as supposed by the Judge. The defendant held his tenure, averring it to be rent-free; the plaintiff sued to resume, and obtained a decree; he then sued for assessment and obtained a decree fixing the assessment at Rupees 238-7 per annum. We hold that the decree was a sufficient notice to the defendant that he was liable to pay Rupees 238-7 per annum, and that if he held from year to year, or held over after the *expiry* of his lease, he did so at the same rate of rent.

In the matter of interest, we are of opinion that the plaintiff is entitled to recover. The plaintiff (special appellant), we find, was prosecuting his claim. There was no unnecessary delay. The proceedings taken by the plaintiff ended in a non-suit, but he again instituted a suit without delay. The defendants being well aware that they were bound to pay rent according to the rate decreed, or to resign their tenure, have harassed the plaintiff, and by their own acts protracted the controversy. For these reasons we reverse the decision of the Judge, and decree this special appeal and the plaintiff's claim in full, with costs of this appeal, bearing interest at the rate of 12 per cent. per annum, and for which the special respondents are liable.

The 24th April 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges*.

Enhancement—Presumption of fixed holding—Evidence.

Case No. 72 of 1862.

Regular Appeal from a decision of Mr. F. B. Kemp, Judge of Jessore, dated the 10th December 1861.

Debranee Dossee (one of the Defendants) *Appellant*,

versus

Brojunggonna Dossee, mother and guardian of Chunder Koomar Roy and Kalleeprosono Roy, minors, and Hurronath Roy and others (Plaintiffs) *Respondents*.

Baboo Dwarkanauth Mitter for Appellants.

None for Respondents.

Suit laid at Rupees 528-8*g*.

Suit for enhancement of rent of a shamila talook from 661-8 Sicca Rupees to 7,528-0-8 Co.'s Rs.

Held by Chief Justice, upon the evidence in this case, that payment for a time at a fixed rate afforded presumption that the talook had been held at a fixed rent for more than 12 years prior to Regulation VIII of 1793, and was consequently protected from enhancement by Sections 49 and 51 of that Regulation.

Held by Bayley, J. that the evidence of holding at a fixed rent during the period mentioned, without the production of passed documentary evidence, was not sufficient to warrant the presumption.

The Chief Justice.—This was a suit brought to enhance the rent of a shamila talook from 661-8 Sicca Rupees to Company's Rupees 7,528-0-8. The learned Judge Mr. Kemp who tried the suit originally, is one of the Judges by whom the present appeal has been heard, and he adheres to his former opinion that the rent ought to be enhanced. I regret to say that Mr. Justice Bayley and I do not concur in that opinion, and that we do not agree with each other. It appears to me that the evidence produced was sufficient to prove *primâ facie* that the tenant held at a rent which could not be enhanced. From the terms of the plaintiff's notice, I think there can be no doubt that Sicca Rupees 661-8 was the rent paid for a long time, and that it was paid from a time when the Sicca Rupee was the current coin instead of the Company's Rupee. Although the plaintiff has called it a variable rent, no evidence was given to show that it has ever been varied. The plaintiff now seeks to enhance the rent from Rupees 661-8 to Rupees 7,528. It seems very improbable that the land could have altered so much in value in the course of a short period; and, therefore, if the plaintiff is entitled to enhance his rent to the extent claimed, it may reasonably be presumed that the talookdar must have been allowed to hold the talook for many years at a rent much below the real value. To what are we to attribute the conduct of the zemindar in this respect? Did he allow the talookdar to remain there as a matter of favor, or because he knew that he had no right to enhance? In the absence of any evidence to the contrary, I should presume that he did so because he knew that the rent of the tenure could not be legally enhanced. I should presume upon the evidence that the talookdars had held the talook at a fixed rent for more than 12 years prior to Regulation VIII of 1793, and were consequently protected from enhancement by Sections 49 and 51 of that Regulation. If presumptions are not to be drawn from long usage, it would in many cases be impossible to prove an ancient right. My Hon'ble Colleague Mr. Justice Bayley, however, is of opinion, that the evidence of holding at a fixed rent during the period I have mentioned, without the production of some documentary evidence, is not sufficient to warrant the presumption. A Doul Bundobust was referred to by the learned Judge who tried the case in the Court below; but its existence appeared merely from a decision in the suit brought by a mortgagee to which reference is made in the judgment. We think therefore that it was not proved by legal evidence. It is dated in 1210 corresponding with 1803. It recited that the talook was formerly held by Aftaboodeen (agreeing with the Quinquennial Register), and that it was purchased by Roheem Khan and held at the rent of 661-8 Sicca Rupees. This Doul, if genuine, shows that the talook was held as far back as 1833, nearly 60 years ago, at the present rent; and that the Doul was not the creation of the talook, for it recites that it was merely a confirmation of a former holding. If this Doul had been legally proved, Mr. Justice Bayley thinks that the presumption might have

been legally made, in the absence of any evidence to rebut it, that the talook was held at the present rent more than 12 years before the date of the Regulation of 1793, and that consequently it was not liable to enhancement. If the Doul be proved, there is a majority of Judges that the tenure is not liable to enhancement. But if it is not proved, there is a majority that the rent can be enhanced. But even then it can only be enhanced to that which is a fair and reasonable rent. The case is, therefore, remanded to the Judge to try whether the Doul referred to existed or not. If it did not exist, the rent may be enhanced; but if it does exist, my learned Colleague Mr. Justice Bayley is prepared to concur with me that the rent cannot be enhanced, unless the zemindar can bring his case within the exception made in Section 51 Regulation VIII of 1793. The zemindar will have a right to prove, if he can, that he was entitled to enhance under the provisions of that Section. Therefore, if the Doul be not proved to the satisfaction of the Judge, he will go on and enquire what is a fair and reasonable amount of rent to be paid for the talook. Both my learned Colleagues Mr. Justice Bayley and Mr. Justice Kemp agree that the question as to what is a fair and reasonable rent was not proved by legal evidence, and therefore, if necessary, the question must be retried. This investigation will not be necessary if the Doul be proved, unless the zemindar prove that he is entitled to enhance under Section 51 Regulation VIII of 1793. The case is, therefore, remanded to try whether such a Doul existed. If so, the Judge must allow the zemindar to prove, if he can, that he had a right to enhance according to the provisions of Section 51 Regulation VIII of 1793. If the Doul be not proved, or if, being proved, the zemindar prove that he is entitled to enhance the rent under Section 51 of Regulation VIII of 1793, the Judge will proceed to find what is a fair and reasonable rent for the talook. The finding will be returned to us for our final decision of the case. The Judge is referred to the decision of the late Sudder Court, 30th April 1858, page 902, Rajkissen Roy *versus* Boydonath Nundee.

The 27th April 1863.

Present:

The Hon'ble C. Steer, W. S. Seton-Karr, and Shumbhoonauth Pundit, *Judges.*

Resumption of Lakheraj—Onus probandi—Presumption (from registration in 1795.)

Case No. 208 of 1860.

Regular Appeal from a decision of Roy Ramlochun Ghose, Principal Sudder Ameen of Nuddea, dated the 21st March 1860.

Omesh Chunder Roy (Plaintiff) *Appellant,*

versus

Dukhina Soondry Debea and others (Defendants) *Respondents.*

Baboo Juggadanund Mookerjee for Appellant.

Baboos Kishen Kishore Ghose, Taruchnauth Sein, and *Poorno Chunder Roy* for Respondents.

Suit laid at Rupees 14,994-13-1.

In a suit for resumption of lakheraj land, the onus of proving the existence of the lakeraj tenure before 1790 is on the defendant.

Registration by the Collector in 1795 as lakheraj affords presumption of the lakheraj having commenced before 1790.

Mr. Justice Steer.—There is some documentary evidence of *some* lakheraj land said to have been in existence in 1795; and it is clear that the defendants are now in possession of some land which *they call* lakheraj, and which the witnesses on their behalf testify to have come down to them from a date prior to 1790, and to be part of the larger lakheraj property to which the documentary evidence of 1795 relates.

Between these two great gaps, 1795 and the present period, there is, however, no evidence of any sort. There is no evidence of a lakheraj prior to 1795; no evidence further than that a tenure said to be in existence prior to 1790, was registered in 1795; and there is no evidence, entitled to be so called, that the land now held and claimed as lakheraj is part and parcel of the same lakheraj which was registered in 1795, or that, if it was so, possession of it as lakheraj, uninterrupted and continuous, has been held from that date.

I think then, that the defendant upon whom lies the burden of proving that he or his predecessors have held the land he now calls lakheraj from prior to 1790, has altogether failed to establish that position.

It is true, the plaintiff has not shown that he has ever received any rent for these lands, but he is not required to prove any thing of this sort, or any thing at all.

It is sufficient for him to challenge the title of the defendant, and unless the defendant can give proof of it, the plaintiff is not called upon to do any thing.

It is no argument, therefore, to say that the plaintiff has failed to give any proof, for the burden is all on the defendant; and knowing that the plaintiff has been satisfied, to put the defendant to his proofs, and to stand the result.

Now, is it any argument to say that the defendant cannot be expected to give any better proof of his having held his lands as lakheraj from prior to 1790. It is not a sudden or an unexpected call that has now been made upon him. Every lakherajdar knows that he may at any time be called upon to prove his title. All the country know the jealousy with which the Government has all along looked upon titles to hold land exempt from the payment of rent or revenue. Under these circumstances it is only natural to expect that persons who hold, or persons who acquire titles to hold lakheraj lands, will be careful to preserve their title-deeds; and so far from time being any impediment in the way of a lakherajdar proving his title, the reverse is the case. The longer he has held, the better should he be

prepared to support his title by documentary proof.

Have lakherajdars no quarrels among themselves--no quarrels with their neighbours—no occasion to sue for rent—no occasion to measure their lands?. These are all occasions when additions are made to evidence of title; and whereas, in the case before us, there is no corroborative evidence of a title, and no original title-deed, I look upon a claim so devoid of support with the utmost suspicion. The holders of this lakheraj, if it had existed since 1790, could not have been so unmindful of their interests as not to keep alive and preserve a single *iota* of evidence of their rights.

And inasmuch as no evidence is forthcoming relating to any period between 1795 and the present time, I cannot give credit to the assertion of the lakherajdars that they and their predecessors have held the lands as lakheraj from 1790, that is from such a period as to bar any claim of the zemindar to subject them to assessment.

That being the case, I think the plaintiff is entitled to a decree.

Mr. Justice Seton-Karr.—This is a case for the resumption of 20 pieces of rent-free lands, making up 48 beegahs 16 cottahs in all within the estate of the plaintiff, to which estate he has succeeded by right of inheritance and by purchase.

The lower Court, in a rather short decision, has dismissed the suit, holding that the defendants have, on the whole, made out their possession as rent-free tenants from a period antecedent to the 1st of December 1790.

In appeal by the zemindar, it is clear that the case turns on whether the defendants have shown possession under a rent-free tenure previous to this date, and that the validity or invalidity of the grant need not be enquired into, if such possession can be shown or inferred. We have, therefore, thought it expedient at once to call on the respondents' pleader to support the lower Court's decision, it being on a defendant, in these cases, that the burden of proof must eventually fall. The evidence on which the defendants rely, consists in *taidads*, the report of the Collector made in conformity with law, deeds of sale, and oral evidence.

I find that the defendants produce copies of a number of *taidads*, 7 in all, which were duly registered by the Revenue Authorities, in the month of Agran 1202, or in November 1795. These copies are all authenticated; they have been compared by the Collector with the registry book of such documents, and have been found to tally with the same; they were recorded as nearly all covered by *Sunnuds* granted by the ancestor of the Maharajah of Nuddea; and I can see no force in any of the exceptions taken to them by the pleader for the appellant to the effect that one or two figures have been visibly altered. A 3 has certainly been evidently altered into a 5 in the year 1195, but it does not seem that this alteration, which is a very palpable one, could have been made with any evil design, since it matters nothing as regards the merits of the defence, whether we read the one year or the other.

It is urged by the appellant's pleader in reply, that these *taidads* cover a much larger extent of ground than forms the subject of suit, and that it is not shown that the lands held by the defendants are identical with any land mentioned in the said *taidads*, or how they are protected by these documents.

This link in the evidence, the defendants endeavour to supply by producing the deeds of sale from their vendors, and by the oral testimony of ryots who depose that they and their fathers have been tenants on these rent-free lands from time immemorial; some of the witnesses declare that they or their fathers paid rent originally to the vendors, and since the transfer to the defendants as purchasers.

This evidence seems consistent and credible, and it is the best that the defendants can produce.

In a suit like this, it would have perhaps told more in the defendant's favour, had they been able to produce some other evidence of a date between the *taidads* of 1795 and the present suit, tending to connect the lands claimed with the *taidads*, and to mark out their identity independently of the oral evidence to this effect. But the absence of this evidence is due to the long, peaceful, and undisturbed possession of the alleged lakherajdars, they never having had occasion to sue regarding their rents, and no one hitherto having thought of challenging their tenure or possession. But the absence of any such evidence ought not to be strained to their prejudice. It is at any rate clear that they have never tried to get up cases, or to manufacture evidence in support of their title since this purchase; and the very position of these lands in the neighbourhood of such a place as Santipore, must have made the nature of the tenure well-known. It might have been challenged by any one, had there been any real grounds for impugning the title during so long a period.

Much stress is laid by the respondents on the report of the Collector, to whom this case was referred for report under Section 30 Regulation II of 1819, and who has sent in a very full and comprehensive statement, dated the 7th of February 1856, in which, after going through the evidence to each separate piece of land, he pronounces in favour of defendants' title. In a case like this, much weight must be attached to such a report legally made by such an authority, and nothing whatever has been advanced to invalidate or set it aside, except an argument that the identification of each piece of land depends on somewhat similar evidence and similar deductions, which, considering the features of the case, is not very surprising.

It is strongly urged, however, by the appellants that although the *taidads* may have been duly registered in Agran 1262 or in 1795, and are trustworthy, there is no evidence to carry back the possession of the defendants over the 1st of December 1790; and that consequently, we must infer the possession of the defendants as rent-free tenants to have commenced in 1795, or hold it not proved before that time, in the absence of

any further evidence. But I think the legitimate inference, after the obvious impossibility of producing any further evidence on this point, may fairly be the other way. It is not very likely that the Collector in 1795, only two years after the passing of the law for registration, registered new *taidads* or new rent-free tenures under such *taidads*. The reasonable inference from such registration is, that the tenures were old, and that they had been in the peaceable possession of the parties registering, who appeared before and satisfied the Collector of that day, from a period anterior to 1790.

It is further objected that the zemindar wished to adduce some witnesses of his own before the Collector, in order to prove that the lands claimed were distinct from those designated in their *taidads*, but that the Collector would not receive the evidence.

This objection is of no force. The case was formally sent up to the Principal Sudder Ameen, and it was since remanded to him by the late Sudder Court.

In the interval between February 1856, when the Collector made his investigation, and the 21st March 1860, when the case was finally decided in the lower Court, there was ample opportunity for the appellant to have adduced more evidence on this head, as is contemplated under Section 6 Clause 8 of Regulation II of 1819, had he had any worth producing. On the whole, I am decidedly of opinion, that the defendant has made out a very fair case to support his title, considering the great lapse of time which in itself should lend strength to that title, as it is supposed to do by legal presumptions in all other cases. The defendants or their predecessors have held their lands under various zemindars, unchallenged, and without ever having been asked for one pice of rent from a period, which goes beyond living testimony, and which may be fairly taken to carry them back over the 1st of December 1790.

I have referred to the ruling cases in these matters; namely, Digumber Mitter's, page 617 of 1856, and Polin Chunder Gossein, page 151 of 1861. In the latter decision, the law on these matters is ably and fully reviewed; and applying it to the facts disclosed, I am of opinion that, from the *taidads* and their registration in 1795, we may infer the possession of the defendants to commence before December 1790, which finding on evidence would put the zemindar out of Court by limitation; and on the second point urged in the case, I hold that the identity of the lands is sufficiently made out by the oral evidence and by the report of the Collector, which is very full and which has not been invalidated.

In this view, I would uphold the decision of the lower Court, and would dismiss the appeal, with costs.

Mr. Justice Sumbhoonauth Pundit—I agree with Mr. Justice W. S. Seton-Karr. It may, in this case, with reference to its surrounding circumstances, be safely and legally presumed, with reference to the question of evidence, that the lakheraj tenures to which the *taidads* now filed by the defendants were originally put in, existed before 1790, as represented in those *taidads*.

The *primâ facie* made out by the defendants on whom, undoubtedly, the entire *onus* lay, is not any way contradicted or disproved by the plaintiff, who cannot show that, at any time subsequent to 1790, these tenures ever paid any rent. I am aware of the distinction drawn by the late Sudder Court between possession under lakheraj tenure under a rent-free title, and simply holding possession of lands without payment of any rent. Here it cannot be denied that, by the production of the *taidads* and *sunnuds* as mentioned in them, a title of lakheraj adverse to the mâl rights of the landholder was set up. It being proved by the evidence on the record to the satisfaction of the Collector, the Zillah Judge, my colleague with whom I am agreeing, and myself, that the lands in dispute were held as lakheraj since 1st December 1790, under the repeated rulings of the late Sudder Court, limitation must apply to the claim of the landlord. It is not, therefore, necessary in this case to try the validity of these lakheraj tenures.

It was quite sufficient, if not more than necessary, to this case that the Collector found the *taidads* filed to agree with the books of his record; and his investigation, except with reference to small portions, goes to uphold the validity of these tenures. I have not however any occasion to try this point. The fact of the defendants being now in possession of the lands in dispute is not denied, and their right to remain so by purchase is proved by deeds and evidence produced by them. Therefore, I am also of opinion that the appeal of the appellant should be dismissed with costs.

The 28th April 1863.*

Present :

The Hon'ble C. Steer and E. P. Levinge, *Judges.*

Hosaipore Raj (Succession to)—Hindoo Law (of Inheritance)—Family Custom.

Regular Appeals from decisions of the Judge of Sarun, dated 24th August 1860.

Case No. 361 of 1860.

Baboo Teluckdharee Sahie (Plaintiff) *Appellant*

versus

Maharajah Rajender Protaub Sahie (Defendant) *Respondent.*

The Advocate General, Messrs. R. V. Doyne and *R. T. Allan*, and *Moulvie Syed Murhamut Hossein* for Appellant.

Moonshee Ameer Ally and *Baboo Kishen Kishore Ghose* for Respondent.

Suit laid at Rs. 71,79,527-1-2.

* It has been suggested that this case should be included in the present No., as being a very important case never before published.

Case No. 371 of 1860.

Maharajah Rajender Protaub Sahie (Defendant) *Appellant*,

versus

Baboo Teluckdharee Sahie and others (Plaintiffs) and others (Defendants) *Respondents.*

Moonshee Ameer Ally and *Baboo Kishen Kishore Ghose* for Appellant.

Mr. R. T. Allan and *Moulvie Murhamut Hossein*, for Respondents.

Suit laid at Rs. 71,79,527-1-2.

Case No. 306 of 1860.

Ram Misser Singh (Defendant) *Appellant*,

versus

Baboo Teluckdharee Sahie and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Dwarkanauth Mitter for Appellant.

Moulvie Syed Murhamut Hossein and *Baboo Gopaul Laul Mitter* for Respondents.

Suit laid at Rs. 71,79,527-1-2.

Case No. 374 of 1860.

Ram Golaum Singh and others (Defendants) *Appellants*,

versus

Baboo Teluckdharee Sahie and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboos Dwarkanauth Mitter and *Kishen Succa Mookerjee* for Appellant.

Moulvie Syed Murhamut Hossein for Respondents.

Suit laid at Rs. 71,79,527-1-2.

On the accession of the British Government to the Dewanny, Rajah Futtah Sahie in 1767 having refused to acknowledge allegiance to, and having openly rebelled against the Government, was expelled from his estate of Hosaipore. The Government retained the estate in its own possession until 1790, when, setting aside the sons of Futtah Sahie, it conferred the estate upon Chutterdharee at that time the eldest surviving member of the younger branch of the family. Two of the grandsons of Chutterdharee having sued to establish their right to a moiety of his property,—HELD that the Hosaipore property was a Raj, and that by the rule of the family it was to descend entire to a single heir; that the Government, by setting aside a particular branch of the family, did not, in intent or in fact, confiscate the property, and thereby extinguish the rights of every member of the family; that the family custom and the custom of the Raj were not destroyed by the infringement of the custom by virtue of which Chutterdharee acquired the estate; and that he having acquired the estate subject to a particular custom, and having himself done nothing destructive of that custom, his heirs were bound by the same custom, to the exclusion of the ordinary law of Hindoo Inheritance.

THE plaintiffs, as two of the grandsons of the late Maharajah Chutterdharee Sahie, sue to establish their right to a moiety of the entire moveable and immoveable property left by the said Maharajah, and to cancel a Will. It is also prayed hat certain fictitious tenures created by the principal defendant in favor of parties who have aided him in setting up a title to the estate may be declared null and void as being false and fraudulent, and that certain miscellaneou orders of the Zillah Authorities and of the Sudder Court, adverse to the rights and interests of the plaintiff, may also be set aside. The valuation of the property for fixing the stamp duty is Rs. 71,79,527-12-18¾.

Since an appeal was filed in this Court, one of the two original plaintiffs, Baboo Teluckdharee Sahie has withdrawn from the contention; but the appeal of the other plaintiff raises all the same points which the conjoint appeal of the two appellants raised.

The answer of the principal defendant Rajender Protaub Sahie who is the great grandson of the Maharajah Chutterdharee Sahie (his father Ojur Protaub Sahie having waived his rights in favor of his son) is that the Maharajah Chutterdharee Sahie died possessed of a Raj, which, by the general custom of the country and by the particular custom of the family, has always descended from time immemorial, whole and entire, to the eldest male branch; that the Maharajah first made a verbal gift or nuncupative Will (it is not clear from the answer which is intended, or whether both are not intended) in favor of the principal defendant; and that he executed, a few hours before his death, a written will declaring him to be his sole heir and successor, and, as such, bequeathed to him every thing, both moveable and immoveable, belonging to him.

Such is in essence the substance of the pleadings; but before we proceed to lay down the issues which they involve, we think it right to record such further information in connection with the subject of this suit, as seems to us likely to be of use in leading to a proper understanding of the merits of this important case.

The late Maharajah Chutterdharee Sahie had two sons Baboo Ram Sahie Sahie, and Baboo Pritipal Sahie; these both died during the life-time of their father.

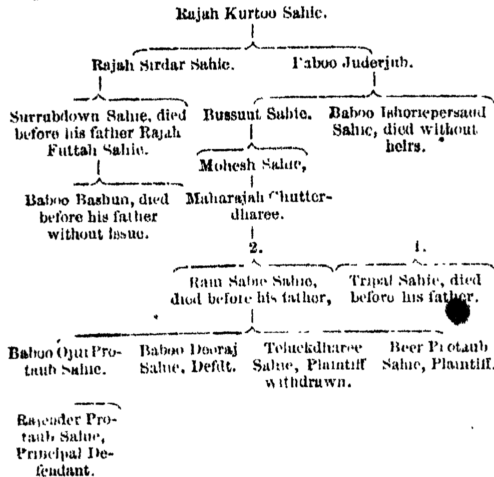
Baboo Ram Sahie Sahie left two sons, *viz.*, Baboo Azar Protaub Sahie and Baboo Deoraj Sahie; the principal defendant Rajender Protaub Sahie is the son of Baboo Azur Protaub Sahie and the great grandson therefore of Maharajah Chutterdharee Sahie.

As already observed, Baboo Azur Protaub Sahie who is the eldest grandson of the Maharajah might have claimed under the family custom to be his sole heir, has waived his rights in favor of his son Baboo Deoraj Sahie who has no claim of any sort to prefer, and therefore declines to join the plaintiffs his cousins in their action.

The other and younger son of Maharajah Chutterdharee, *viz.*, Baboo Pritipal Sahie left two sons, Baboo Teluckdharee Sahie (who has since withdrawn from the suit) and Baboo Beer Protaub Sahie the only party now carrying on the suit in appeal.

A very long list of ancestors is given by the defendants, but it is not necessary to ascend above Chutterdharee beyond three or four generations.

Kurtoo Sahie was one of their ancestors, and he held the Raj. The state of the family subsequent to him is shown in the following table:—



On the accession of the British Government to the Dewanny, Rajah Futtah Sahie in 1767 refused to acknowledge allegiance to us. He openly rebelled against us, and we were obliged by force of arms to expel him from his estate of Pergunnah Hosaipore in Zillah Sarun. Having been driven from his estate in our dominions, he fled into the zillah of Goruckpore, which was, at that time, a part of the independent territory of Oude; and the East India Company took possession of his estate within the zillah of Sarun, and which, with other property, is the subject matter of the present contention.

Having kept the estate in its own possession till 1790, that is to say for about 25 years, the Government, setting aside the sons of Futtah Sahie, conferred it upon Chutterdharee, whose father Mohesh, and whose grandfather Bussunt, having both died subsequent to Futtah Sahie's rebellion, was at the time the eldest surviving member of the younger branch of Rajah Kurtoo Sahie.

The Judge in the Court below has decided that there was neither gift, nuncupative Will, nor written Will. He has found in favor of a family custom, whereby the eldest surviving male heir succeeds to the entire estate to the exclusion of the other heirs; and he considers that the estate is one which is entitled to be considered an ancient Raj. He has accordingly dismissed the suit of the plaintiffs, awarding however in their favor 2,000 Rupees each monthly, as maintenance, and giving their costs as well as the costs of all the other parties against the principal defendant.

This decision has given rise to four distinct and separate appeals.

One of the plaintiffs Beer Protaub Sahie appeals in No 361, because his right to a partition under the Hindoo law has been disallowed.

The principal defendant Rajender Protaub Sahie appeals in No. 371, because the Judge has found the gift, the nuncupative Will, and the written Will to be not proved; because the sum awarded as maintenance is excessive; and because the costs of those parties, who were without any necessity made defendants, have been wrongly cast upon him.

Ojoodeah Persaud appeals in No. 374, praying that, if on the appeal of the principal defendant that party is exempted from paying the costs of this appellant, they may be made payable by the plaintiffs.

Ram Fuckeer Singh appeals in No. 306, because the Judge has not given him as costs the sum he was entitled to as vakeel's fees.

We shall dispose of these four appeals in this judgment, but we shall consider them separately each upon its own merits.

The issues which arise in the appeal of the plaintiff No. 361 are:—

1*st.* What is the nature of the Hosaipore property. Is it an ordinary Zemindary or is it a Raj?

2*nd.* Was there in this estate, or Raj, a family custom, whereby it has descended entire to the eldest male member of the eldest branch?

3*rd.* Did the succession of Maharajah Chutterdharee, who was not the eldest son of the eldest branch (sons of Futtah Sahie being undoubtedly alive at the time), create or constitute such a breach in the family custom as to deprive the family of Chutterdharee of the custom which had previously prevailed with respect to the descent?

4*th.* Did Chutterdharee hold any property other than what he received with the Raj, and does the law of primogeniture apply to this separate property?

In considering the nature of this property, we shall for the present look at it as it was in the hands of Futtah Sahie. Whether any change took place in its essence or character in consequence of the way in which it came into the hands of Chutterdharee Sahie, we shall reserve for consideration and discussion when we come to the third issue. Was then the Hosaipore estate a Raj as it existed in the time of Futtah Sahie?

We do not find that it is anywhere definitely laid down what a Raj is. There are many decisions in which estates have been found to be Raj or Principalities; but what exactly constitutes a Raj has not, as far as we are aware, been anywhere set forth. We think, however, that the estate of Hosaipore contains all the essential characteristics on account of which other large landed estates have, before this, been regarded as Raj, and that it is entitled to be so regarded by us.

There is no Sunnud or other pottah of nobility, owing probably to all such papers having been carried off by Futtah Sahie at the time of his rebellion. His heirs are not likely, even if they have such a document, to give it up to another branch of the family who has supplanted them in the honors and possessions of their ancestors; but there is no doubt that Futtah Sahie was himself a Rajah, and that he was one of a long line of ancestors who appear to have held that rank. The Hosaipore estate was in Futtah Sahie's hands a very extensive one; and his means and power were, as the British Government

experienced, both very considerable. An estate of this sort both large and ancient in such hands is not to be regarded as an ordinary zemindary. Even where proprietors are not nobles, if their estates are very large, they are regarded, according to Colebrooke, by modern Hindoo lawyers, as Raj or Principalities. There is evidence of a very high character, namely the evidence of men who are either Rajahs, or descendants or connections of such, that this is a Raj, and has always been so regarded by them and by their families. It has been held in the same family for many generations, and has descended entire to one heir in exclusion of the rest of the family. The authorities, in speaking and writing of this property, have designated it a Raj; and it is commonly called a Raj to this day; and in recognition of it as such, the title of Maharajah was acceded to Chutterdharee by the Government (not immediately but some years subsequent to his accession to the estate), on the representation of the highest local authorities that the preceding proprietors had all been Rajahs.

Then, as to the family custom, we need say but little, having found that the property is a Raj. As a Raj, there must of necessity be impartibility; and we find that it is sufficiently established, by the evidence and by the geneological statement put in by the principal defendant, and the accuracy of which has not even been impeached in the written pleadings, that the rule of the family has invariably been that the property descends entire to the eldest son. There is, we say, actual evidence of this, and the very existence of the property up to this day in its present state is proof of it. Had there been any other rule, the estate could not have come down to the present generation such a princely inheritance as it is. Had there ever been any partition, nothing could have been easier to the plaintiff than to have pointed out and cited as witnesses, parties and members of the family who have received part of the Hosaipore estate in any previous partition; but this obvious and facile mode of proving their own case, and of utterly upsetting that of their opponents, has not been attempted.

Having found this to be a Raj up to the time of Futtah Sahie, and that the rule of the family has been that it has descended entire to a single heir, we now come to consider in what light this property is to be regarded when Chutterdharee succeeded to it.

Futtah Sahie rebelled in 1766-67. From that time to 1790 the Hosaipore property was in the hands of Government. It is material to consider in what capacity the Government held this estate for these 23 or 24 years. On the one hand it is maintained that the Government confiscated the estate, kept it and dealt with it as their own, and ultimately of its free will and accord bestowed it as a gift on Chutterdharee.

On the other hand it is contended that, though the heir of Futtah Sahie was cut off in consequence of his rebellion, the estate was not confiscated but remained in abeyance in the hands of Government; that it was ultimately given to Chutterdharee as the party legally entitled to it, and not as a gift at all.

In favor of confiscation we have the fact that the Government took possession of the estate, and dealt with it just as they would have done, had the estate been their absolute property. They would not give it to Bussunt who, after the life of Futtah Sahie, was the next heir; nor on the death or murder of Bussunt (for it is alleged that he was murdered by Futtah Sahie) would they give it to his son, Mohesh. When they did give it to Chutterdharee, who was Mohesh's son, they kept every fraction of the collections during the time of their possession giving him the bare estate, without either the accumulation or the title.

On the other hand, there is no trace of any order which declares the estate forfeited to Government. When it was proposed to Government, towards the close of its possession, to declare the estate confiscated and to sell it, the reply of Government was to confer it on Chutterdharee (*vide* Letter of Government to the Board of Revenue, dated 28th July 1790).

If this was all then that we had to judge from, we could hardly venture to say that it amounted to proof of confiscation. But when we consider that the Government during 1767 and 1790 were the mere representatives of the Mahomedan rulers, and had engaged to govern the country in conformity to the Mahomedan laws, and that confiscation of property for an act of rebellion is no part of the Mahomedan law, we can have no hesitation in deciding that the weight of evidence is altogether opposed to the idea of a confiscation.

In the Hidya (*see* Book 9 Chapter 10 under the head of rebels) it is ordained that the property of rebels shall not be confiscated but kept in attachment till they repent. It is further ordained that, as a means to bring them the sooner back to their allegiance, it is lawful and proper to deprive them of all the profits of their land and other sources of income.

This being the law under which the Government could alone lawfully deal with this property, there is nothing in the conduct or proceedings of Government at the time, which is opposed in any respect to the supposition that they were acting, as the Mahomedan law directed, as trustees of the property; and the fact of the appropriation of the proceeds of the estate by the Government, which seemed to be the strongest proof of a *defacto*, if not a *dejure* confiscation, turns to be no proof of confiscation at all, for the Government had clearly a right, as long as they were not satisfied of Futtah Sahie's repentance, to take and to keep every iota of the proceeds of his estate.

It has not escaped us that, in giving the estate to Chutterdharee, it is difficult to imagine that the Government had at the time any eye to the Mahomedan law in their treatment of this property. We say we are aware that such an objection may be raised; and all that we have to say in regard to it is that it is very possible the Government had no right, while sons and heirs of Futtah

Sahie were alive, to relinquish the property to any but such son or heir. It is not, however, because the Government have done one apparent wrong, that we are to presume that they did every thing else in the same way. It is not because they passed over a son of Futtah Sahie and gave the estate to a son of the younger branch, that we are to conclude they did every thing else illegally—illegally confiscated the estate, and illegally treating it as their own exclusive property, bestowed it on one without any regard to right.

We say it appears to us possible that Government had no right to give the estate at the time they gave it, and in the condition of Futtah Sahie's family to Chutterdharee. But it is one thing to set aside and to cut off a particular branch of a family from their ordinary right or succession, that is in direct words to cut off the progeny of Futtah Sahie, and another to confiscate the property itself, and so extinguish the rights of every member of the family in regard to it. It is not, because Futtah Sahie's heirs were excluded from the property, that we are to consider the Government acted in that matter as under the belief that they were free to do what they liked with the property, either keeping it themselves or giving it to any one else, as it might please them.

We think then that this objection does not invalidate in any degree the correctness of the conclusion that we have arrived at, that the Government did not, in intent or in fact, confiscate this property.

But there is no doubt that, in giving it to Chutterdharee, or rather in allowing Chutterdharee to take it out of their hands, the Government did not give it to one who at the time appeared to be the party entitled, by right of birth, to it. It is clear that there were sons then living of Futtah Sahie, who, if there was no confiscation, or if there was no power to confiscate under the law as existing at that time, ought to have obtained it. Chutterdharee, then, not having been the party who in right of family custom was entitled to the estate, has there, it may, be asked, been such a breach in the order of succession as to destroy altogether the future right of his descendants to the rule of primogeniture which had previously existed in his family?

There was, as we have said, no confiscation. The estate, therefore, that Chutterdharee received from Government was the very same estate that the Government took charge of in consequence of Futtah Sahie's rebellion. This, as we have shown, was a Raj, and as a Raj the law of primogeniture, or of succession by one member to the entire estate, to the exclusion of all the other heirs, is impressed upon the estate, and is an inherent condition essential to its existence.

We will not go the length of saying, as was contended for by the learned Counsel for the respondent, that under no circumstances can property which constitutes a Raj be divided, for it may pass into the hands of strangers, say in right of purchase at public auction for arrears of Government revenue, and it is impossible to hold that the purchaser, whoever he may be, has no power of making any disposition of the property, but that his first born has, in right of birth, an indefeasible title to the whole and entire estate. We do think, however, that while the estate remains in the same family, having come down to them from father to son, or to some other single member, the rule of impartibility must regulate all the revolutions of the family. Where, however, any individual, be he one of the family or a stranger, acquires the Raj property in any other way than by descent, it is to him a new estate, and he is not of course bound by the law of primogeniture; though there is a decision of the late Sudder, wherein it was held that a Raj which had been confiscated and given to a stranger devolved entire on the death of the stranger to his eldest son, and that his other heirs had no right to any portion of it.

In this case, which will be found in page 92 Volume 2 of the Select Reports of the Calcutta Sudder, there had been one succession between the Government donee and the party in whose favor the decree was passed; and it may be that the Court were led, in reliance upon this fact, to conclude that the old rule of descent, prevailing in the Raj, had been acquiesced in by the family of the new proprietors; or it may have been thought that the property remained still a Raj, with all the incidents of a Raj, notwithstanding that it had been confiscated to Government, and notwithstanding that new holders did not derive their title to it by descent from the old proprietors.

However this may be, here is, it is clear, a precedent which would carry us even farther than we are inclined to think we can safely go. Placing then no great reliance in this case, and not drawing any final conclusion from it, we will proceed, quite independent of it, to give our reasons why we hold that the family custom and the custom of the Raj were not destroyed from the breach in the custom by virtue of which Chutterdharee acquired the estate.

We have held that there was a family custom down to Futtah Sahie's time by which the estate devolved to the eldest male heir. Government took that estate subject to that custom, for, as there was no extinction of the Raj, there was no extinction of the custom which was an incident of the Raj. The Government then handed over the same estate as they received to Chutterdharee, and he received it subject to the custom. Those who claim through him, as both the parties to this suit do, are bound by the custom by which he was himself bound. The heirs of Futtah Sahie might, no doubt, have attacked the title of Chutterdharee, on the ground of his not being entitled to the estate by custom, but it is not competent to Chutterdharee's heirs to raise the same contention. Whatever defect might have attached to the origin of Chutterdharee's title, it has been subsequently finally established by not having been impeached for half a century, and it is now as good as if it had never been capable of question. Acquiring as he did an estate subject to a particular

custom, and having himself not done any thing destructive of that custom, his heirs take it subject to the custom.

Having disposed then of all the issues but the last, it remains only to say that, though the Counsel for the appellant did, in his first address, insist that Chutterdharee died seized of property which had come to him separate from the Raj, he gave up this point after hearing the arguments and explanations of the Counsel for the other side. We need, therefore, only record that we find on the last issue for the respondent; and we may say that we should have so found, if the point had not been abandoned by the appellant.

In reference to the contention as to the nature of this property, much stress was laid by the Counsel for the plaintiffs upon the provisions of Regulation XI of 1793. But whatever effect that law may have in destroying family custom and in diverting the mode of descent into its proper channel in accordance with the ordinary rule of Hindoo law, it is not applicable to an estate which is a Raj. As we have found this property was a Raj in Futtah Sahie's time, and was also one in Chutterdharee's, we consider that the Regulation cited has no application to this case. By Hindoo law and by universal custom, a Raj descends entire, and has, notwithstanding the provisions of Regulation XI of 1793, been so held by decisions of the late Sudder Court, and of the Privy Council. Among the latter we need mention no more than the following cases namely:

Moore's Reports Volumes 6 page 187
" " " 7 " 537
" " " 5 " 169

(Note. In this last case, Regulation XI of 1793, though referred to by the Counsel, is not noticed by the Judges, probably as being inapplicable to the case of a Raj.)

The appeal on the part of the defendant No. 371 is on the ground of the Judge having found that there was no gift, no nuncupative Will, or written Will, in favor of the defendant by the late Maharajah Chutterdharee Sahie. The defendant is dissatisfied also with the high allowance awarded as maintenance to the plaintiff; and objection is taken to the Judge's order which holds the defendant liable for the costs of several co-defendants, who were made parties to the suit without any reasonable cause.

The issues this appeal gives rise to are:—

1st. Was there a gift?

2nd. Was there a nuncupative Will?

3rd. Was there a written Will?

4th. Is the amount of Rs. 2,000 per mensem, awarded as maintenance to the plaintiff appellant, a fair or an excessive allowance on that account?

5th. Have any parties been unnecessarily dragged into this contention, and who ought to pay the costs of such parties?

In respect to the main grounds on which this appeal is preferred, as we have already found that, by the custom of the family and by the custom of the Raj, the estate devolves in right to the eldest male heir, there is but one decision which we can possibly come to in regard to the gift and the Wills.

Whether made or not made, we must, by our finding, hold that these acts and deeds are inoperative as having no power of disposition or of selection of his successor from among his heirs. Chutterdharee could not thus devise his estate. But the Counsel for the defendant presses for a decision upon the fact, Will or no Will; and as the other side urges no objection, and possibly it may lessen the litigation which is likely yet to take place between the parties, if we dispose of the question of the gift and of the Wills, we shall proceed to do so. The defendant's statement in respect to the several transactions said by him to have taken place is that the deceased Rajah having, on the day before his death, called his confidential servants round him, made over to him in their presence in absolute gift every thing that he possessed, both real and personal—that, on the morning of the day of his death, he, in presence of respectable witnesses, made a nuncupative Will in the defendant's favor, and some short time after, on the same day, in presence of other respectable persons, principally his own servants and attendants, he had prepared and duly executed a written Will whereby he constituted the defendant his sole heir, and bequeathed to him every thing he possessed. The plaintiff denies the fact of these several transactions. In regard to the gift, the Counsel for the defendant, without quite abandoning the plea, does not urge anything in support of it. We may therefore dismiss the matter of gift.

In regard to the nuncupative Will, a question arises whether, as the issues on it were framed by the Judges of the lower Court, it is competent to the defendant's Counsel to argue that point, except as it is laid down in the issue. The lower Court laid down as the issue in regard to the nuncupative Will, whether such a proceeding did really take place on the day prior to the testator's demise. Now it was not averred that the nuncupative Will was pronounced on the day before the Rajah's demise, so that the Judge had no warrant in assuming that it was made on the day preceding the Rajah's death. The issue filed by the defendant did not give any exact time when this Will was made; his issue prepared the plaintiff to expect that the defendant would prove this Will, not on this day or that day, but on some day, so that he was not deceived by the Judge's error as to the real fact which he had to meet and to rebut. On this view we allowed the Counsel for the defendant to address the Court on the point of a nuncupative Will without reference to the Judge's issue which incorrectly assumed that the Will was made the day before the Rajah's death.

The nuncupative Will is sought to be established on the evidence of two European gentlemen who went to see the Rajah on the day of his death; the gentlemen are Mr. Lynch and Mr. E. McDonel, both in the employ of Government, and persons of undoubted veracity. They say that, while they were with the Rajah, he put out

of the room every person but themselves, one native or two, and the chief defendant. He then declared in their presence in the most solemn manner that the chief defendant was his sole heir, and that he would succeed to every thing.

We do not think that the words and acts attributed by these witnesses to the Rajah amount to a making of a nuncupative Will, for they are all quite consistent with the supposition that they were done and said in the belief that, under the *Kolachar*, Rajender the chief defendant would be the heir. The very circumstance of a written Will to the same effect having been adopted subsequently tends to show that, in the previous acts and expressions of the deceased Rajah, no testamentary intention was in his mind. In fact what is described to have taken place in the presence of the above said gentlemen is exactly what occurred in the interview which Mr. Richardson the Magistrate had with the Rajah about a month before. If the acts and incidents of one day afford evidence of a nuncupative Will, so do the acts and incidents of the other. In this way there may have been, according to defendant's view, half a dozen nuncupative Wills; and if such evidence as this is allowed to be sufficient to establish a nuncupative Will, we shall hereafter have, on the death of every one leaving property, nuncupative Wills set up by every member of his family. We therefore reject the plea that the Rajah ever made a nuncupative Will.

In regard to the written Will, we have to observe that it is sworn to by several attesting witnesses. None of these persons are, it is true, members of the family, but they are confidential servants. In all these cases it would be better, no doubt, that the parties employed, as witnesses to their acts, persons whose testimony no one could impeach. But it is to be recollected that natives of rank and position are very averse to act in matters which may require them afterwards to give evidence in a Court of Justice; and besides this general reason, there is another more special one which in this case may account for the absence of the relatives. It is plain that the idea of making a written Will was suddenly adopted, having been made very shortly before the death of the testator. It is probable then that, when it was decided to have a Will drawn up, symptoms of certain and approaching death had begun to appear. In this state of things it is not at all to be wondered at that the relatives of the family of whom no single member seems to have been in attendance on the sick man's bedside, were not made attesting witnesses to the deed. To delay the Will till these men were called and brought to the spot, might have been to defeat the Will altogether.

What induces us to give credit to the evidence in support of the Will is that it accords with probability that the deceased should make a Will. For years before, he had on every occasion expressed his great solicitude that the chief defendant might be allowed, with the concurrence of the authorities, to succeed to all the honors and possessions of the Raj. He had all along given out that the chief defendant would be his heir and successor, and he was passionately fond of him. Still he was aware, with reference to the circumstances under which he had himself acquired the property, that the title of his favorite under the *Kolachar* might not be acquiesced in by the other heirs. What more probable than that an old man, distracted with fear lest the hopes of his life in favor of his favorite might be frustrated, and apprehensive as to what might hereafter be decided as to his right to succeed under the *Kolachar*, should take every precaution to secure the succession of his favorite. If he apprehended he was not safe under the *Kolachar*, what more probable than that he should, as he thought, make him safe under the Will.

There is another important consideration which probably operated to disturb the mind of the late Rajah in his last moments in respect to the future of his favorite by the rule of *Kolachar*, the chief defendant. Rajender Protaub Sahie would not succeed to the Raj, for his own father Ojur Protaub Sahie stood in his way. It is true that Ojur Protaub professed to Chutterdharee that he would not oppose his wish that his son should take the estate; but was it sure that he would continue to be true to his professions, and not set up his own claim to the Raj, when Chutterdharee was no more? May we not with reason look upon this as one of the reasons by which Rajah Chutterdharee was actuated in his determination to make a Will. It is one of the probabilities in favor of the fact; and he was probably led to it from the consideration that Ojur Protaub Sahie his grandson should hereafter claim, as he might do, under the *Kolachar*—the Will in favor of his son, the chief defendant, would raise an adverse title in which it might possibly be successfully resisted.

It is these probabilities which sway us in accepting the evidence to the written Will. It was heard of as a fact either the day after, or the day but one after, the Rajah's demise by Mr. Lynch, the same undoubted witness who describes the interview he had with the Rajah a few hours previously; and no doubt can be entertained from the evidence of this same witness, and from others, that the Rajah was in a fit state of mind to make such a Will. The evidence on the other side is of the very worst, while it is as clear as anything can be that the Rajah was, up to a very short time before his death, in his perfect senses, both able and willing to converse with those around him. The plaintiff has the hardihood to put his creatures into the witness box, there to swear that, for 5 days previous to his death, the Rajah was helpless and speechless.

It is said in defendant's answer, and has been so deposed to by the witnesses for the defendant, that the plaintiff appellant was present when the written Will was executed. After the proof that the plaintiff has given of his utter unscrupulousness in getting witnesses to swear to what he knew to be a wicked falsehood, it is not to be regreted that he did not offer himself as a witness to deny on his oath that he was present at the execution,

but his failure to offer this, coupled with his shameful attempt to invalidate the Will by false evidence of the Rajah's physical incapacity, entitles the evidence on the other side to greater weight as being altogether unrebutted.

The plaintiff's Counsel were very strong on the subject of Chutterdharee's omission to give notice to the authorities of the fact of his having executed a written Will. He did inform the authorities by letters, which, though there is a mistake of date, were no doubt dictated, if not written, on the day before his death, that he has nominated Rajender Protaub Sahie, the chief defendant, his heir and successor, and had given to him every thing he possessed; and it is contended that, as no such notice was sent to the authorities of this his last Will and Testament, it is the best proof that no such thing took place. But it it to be observed that the Rajah died a few hours after the Will was executed, probably within four hours. Nothing is clearer than that he was able to talk and to transact business up to within a very few hours of his death. The Will, if ever thought of before, was delayed till the last safe moment, and though the Rajah was in his perfect senses when he made it, he died within 3 or 4 hours after. Thus there was not time, between the completion of the Will and the Rajah's death, to prepare the several letters to the authorities in announcement of the fact. When the other letters above spoken of were despatched, the Rajah was alive, and there was no apprehension of his immediate death. He was himself competent to direct his servants what to say in the letters, and what to do in regard to them; but this was not so in regard to the last act of his life. Had he lived long enough, we have little doubt that he would have sent formal letters of information to the authorities of the fact of his having executed a Will, and as to his successor not having done so. It must be borne in mind what the probable state of the whole household was at such a moment; and inasmuch as the tidings of the Will had not been sent off while the Rajah was alive, it was probably thought that, the opportune time having been unfortunately allowed to pass, the delay of a day or of several days in taking steps to inform the authorities of the fact of the Will was of no consequence. Had steps been taken to give the authorities notice of this Will, if such notice had not been sent off during the life-time of the Rajah, there can be little doubt that the plaintiff would have made as much out of the delay of a day, as he has done out of the longer delay which actually took place.

On the subject as to what is a fit allowance for the appellant as maintenance, we have no evidence on either side. The Judge thinks that 2,000 Rupees a month is a proper allowance; but this seems to us out of all proportion. Besides the appellant, there are two others as near relatives, who are equally entitled to maintenance. If they are to get 2,000 Rupees each also, the defendant will have to pay by way of maintenance 72,000 Rupees yearly. The estate is no doubt a valuable one; but the revenue payable to Government which of course bears some proportion to the yearly gross income, is only 1,73,997 Rupees. 72,000 Rupees as maintenance out of such an estate or out of any estate seems to us decidedly high to pay as maintenance to three junior members of the family; and we think that Rajah Chutterdharee during his minority was only allowed by Government, who were his guardians, 1,000 Rupees a month for his maintenance and state. The plaintiff can very well support himself and keep up the position of his rank upon the same sum. We, therefore, halve the allowance which the Judge has awarded to him.

On the question of costs, the defendant's Counsel has nothing to urge against the Judge's order awarding the costs of the plaintiffs and the costs of Ojur Protaub Sahie against his client. We have therefore nothing to do with their case, and the order of the lower Court as respects them will stand. But objection is made to the costs of the unnecessary defendants being thrown upon the chief defendants, and relief is prayed for from that burden.

The suit is brought to establish a right to have the Hosaipore estate divided into shares, and to obtain a specific share of the same.

In such a matter there was no necessity whatsoever for importing into the case questions which might hereafter have arisen as to the *bonâ fide* nature of certain benamee leases, and of others, said to have been granted by the chief defendant to different parties as gratuity for their services rendered to the chief defendant in the matter of this suit. As well might a party, suing to establish a deed of sale of a property, pray to resume tenures held within the estate on alleged lakheraj titles, or pray to stop or to open a water course within the estate, or pray to have an account of collections taken from an agent of the estate whom he may choose to charge with misappropriation or default. These may no doubt be good causes of future action to the claimant of the estate, but they should be reserved till he establishes his right to the property. Here the plaintiff claims an estate, and before he proves his right to it, he brings unfounded and reckless allegations of benamee and fraudulent transfer which he makes no attempt to prove. We think he is not entitled to be relieved from the costs of parties thus unnecessarily brought into Court, and we accordingly amend the order of the lower Court in respect of the costs of these defendants. The chief defendant will pay his own costs, his father Ojur Protaub Sahie's cost, and the costs of the plaintiff. The costs of every other party we hold to have been unnecessarily and causelessly incurred, and they must, where costs have been given and to the extent given by the lower Court, be borne by the plaintiff.

The above order disposes of the appeal of Ojoodea Persaud No. 374. His is not in reality an appeal at all, but a mere precautionary application. It is in so many words, "if you relieve the chief defendant from paying my costs, give me them from the plaintiff." We have given them in the above order, as incurred in the lower Court,

against the plaintiff; but as a separate appeal on this point was quite unnecessary, the appellant will pay his own costs in this Court.

On the 4th appeal arising out of the Judge's decision, that of Ram Fuckeer Singh No. 306, it appears that the Judge did not allow him any thing on account of vakeel's fees, because the value of the property in regard to which the appellant was concerned was not apparent, and they could not therefore be calculated. Whatever might be thought of this ground, we think a better might have been found. We are clear that the appellant is not entitled to the sum he claims as vakeel's fees, he claims 1,000 Rupees on this account; but as he repudiated all right, title, interest, or concern with the property of which the plaintiff alleged he was the benamee proprietor, he might have remained silent altogether without much risk of any danger. At all events, it is not likely he incurred any thing but the smallest trifle in engaging a vakeel to put in a mere petition of denial; and as he has not stated this amount, and we are clear he has no right to the 1,000 Rupees he claims in this appeal, we think we do him no injustice in dismissing his appeal, and we do so with costs.

Mr. Justice Levinge.—I desire to express, separately and apart from our united judgment on the whole of this case, my reasons for holding that the Raj did not become extinguished by the setting aside of Futtah Sahie and his heirs, and that Chutterdaree took the Raj subject to, and bound by, the family usage.

I find no precise definition of what constitutes a Raj; but I may define it to be a Principality which by universal custom must be preserved *entire*. The succession must be *single* (*See* the Secretary of State in Council of India *vs.* Kamachee Byee Sahaba, 7 Moore's I. A. 537); and whatever has been the *Kolachar* or usage in the family as to the succession, must *continue* to *prevail*. Upon a permanent breach of any of these particulars, the Raj will become extinct (*Vide* Shama Churn's Digest of Hindoo Law 25; also Baboo Gunesh Dutt Singh vs Maharajah Moheshur Singh 6 Moore's I. A. 187.)

It has been urged on behalf of the plaintiff by Mr. Doyne, who has argued this case with great ability, that inasmuch as Futtah Sahie took his title of Rajah into Goruckpore, and as the Raj of Hosaipore was handed over to Chutterdaree in 1790 without the title of Rajah, and inasmuch as that title was not conferred on him until 1837 on his petition as an *opulent zemindar*, these circumstances are proofs of the extinction of the Raj. But it has been said—"The question is "not what was the title or designation of the "owner, but what was the nature of the property "the person held? The term 'Raja,' as it is well said, "has been and may be usurped by almost any body "who is in a situation which would in any degree "give continuance to it." This is the language of the Court in the case before quoted from 6 Moore's I. A. p. 187.

It therefore appears to me that, as we have found that these estates were in Futtah Sahie's time a Raj, and that they have always descended to the eldest son or next male heir of the reigning Rajah, and as it appears to me clear from the authority that I have quoted that it is not an essential attribute of the Raj that the successor should continue to enjoy the title, the only point that remains to be decided is, whether the Raj has been destroyed by a break in the family custom. Unquestionably the estate has continued entire. The same estate or principality that was enjoyed by Futtah Sahie and his ancestors, passed from the hands of Government to Chutterdharee after an interval of 23 years. The Raj has therefore remained entire as far as the landed estates are concerned, and the succession to the property has been single.

Now, does the assumption of a Raj, to the prejudice of the right heir, by a collateral member of the family bound by the *Kolachar* and usage, prevent his eldest son from claiming the Raj under the family usage?

Is there such a break in the *Kolachar* as to destroy the Raj, and let in the ordinary law of Hindoo inheritance under which the estates would become divisible?

If the family custom has been broken through, the Raj has become extinguished; for, as a general rule, family usage to prevail must be uniform and continuous. "To supersede the general maxims of the law, the usage must be such as has been *continuously observed* from time immemorial or for many generations" (Shamachurn's Digest of Hindoo Law p. 303); or as laid down by a case decided in the Sudder Court (Rajah Koernarain Roy *vs.* Dhoronidhur Roy, 7th June 1858). It has been held by this Court on several occasions that, in cases in which a family usage is set up against the ordinary law of inheritance, it is necessary that the usage be *ancient* and *invariable*, and be established by clear and positive proof.

It is admitted, on all sides, that Chutterdharee would never have succeeded to the ancestral estates under the family custom, for, at the time they were conferred on him, Futtah Sahie's heirs were alive; but it does not appear to me that it therefore necessarily follows that the family usage has been effectually effaced or destroyed.

In the course of the argument, no authority has been cited to the Court to show that, when the estates of a Rajah or Zemindar bound by a custom have been seized or usurped, and the line of descent according to the usage broken through, and another member of the same family bound by the custom selected and put into the possession of the estates, the member so selected and his heirs are not bound by the family usage. The nearest case in point is that of Koonwar Singh *vs.* Seonath Singh, 2 Select Reports 92, already mentioned in our judgment; but this point seems to have been overlooked by the Counsel and the Court in the decision of that case, although clearly open on the record. It appears to me, therefore, that we are deciding this important point for the first time, if I may take the authorities as a criterion for that assumption.

We have shewn that the Government did not confiscate the estates. They appear to have followed what was undoubtedly the law of the land at that day, and held the Raj in their possession without declaring it to be confiscated, and without *breaking up the property*; they appear to have fully recognised the principle that the estates or Raj must be preserved entire. It has been shewn in our judgment that, before 1801, the property of rebels was not liable to confiscation; and the Government acknowledged on the 9th July 1801 that they had continuously acted up to that doctrine (*vide* vol. 2 of Digest of Criminal Law by F. L. Beaufort p. 725 2nd Edition).

In order to cure the defect in the law and give the Government power over the estates of subjects in open rebellion against its authority, Regulation X of 1804 was passed, and this is the first measure in force in India on this subject.

According, therefore, to the letter of the law, it would appear that the Government had no legal power in 1790 to confer the Raj on Chutterdharee, but should have held it in trust until the rebel Futtah Sahie repented or until such time as they chose to restore it to him or to his son. But instead of so holding the Raj, they conferred the estates *entire* on the next heir subject to the family usage in the manner and after the several acts done by them specifically set forth in our judgment and appearing upon the record.

The Government before 1804 had no strict legal right to confiscate, although practically in some instances they may have done so; and necessity in those cases may have required them so to act for the protection and due management of their territories. But in this particular instance, it appears to me that there was no evidence of a confiscation and extinction of the ancestral rights and usages of this ancient family, as the estates were preserved entire, and the nearest male heir to the rebel and his issue selected to succeed to the property.

On the whole of this case, therefore, it appears to me that Chutterdharee took the estates subject to the family usage, for the Government manifestly, from the evidence on the record, held the Raj subject to that usage, and what they had they handed over to Chutterdharee. In my opinion he assumed the family estates bound by the family custom (for as a member of that family he and his ancestors had always been subject to and bound by it) just as forcibly and technically as if the estates had been settled on his ancestors, whose descendants were bound by a strict and rigid entail. He was in the entail and might have succeeded to the estates under that entail. He went into possession of those settled estates, *i. e.*, the estates bound by the custom, not as a stranger, but as a member of the family subject to the entail under the custom, and was allowed to continue in undisturbed possession by those who had a prior estate under the same family title. Futtah Sahie's sons never attacked or impeached his title in a Court of Justice, and Chutterdharee never did any act inconsistent with his being the legal successor under the family title. He continued to hold and enjoy the Raj without any interruption from the year 1790 down to the year 1858; and one of the necessary incidents of the Raj is, that it should descend to the nearest male heir of the person in possession. On his death, therefore, (the defendant's father having waived his right) I hold that it has devolved on the defendant.

I need hardly say that it is not without some doubt that I have come to the above conclusion; but, after anxious and careful deliberation, I consider that our judgment in this respect is based on sound principles and substantial justice. By this decision I consider I do no injustice to the plaintiffs who claim to inherit (by virtue of the Hindoo law of inheritance) not through the disinherited offspring of the rebel Futtah Sahie, but through Chutterdaree who, in my judgment, acquired these estates subject to a family usage or particular line of inheritance which binds his heirs, and which therefore excludes the ordinary law of Hindoo inheritance.

The 30th April 1863.*

Present:

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Nattore Estates (Succession to the)—Adoption (Proof of old deeds of)—Reversioner bound to explain delay in enforcing his rights.

Case No. 335 of 1860.

Regular Appeal from a decision passed by Mr. L. S. Jackson, Judge of Rajshahye, dated the 7th September 1860.

Maharanee Kishen Monee Debia and others (Plaintiffs) *Appellants,*

versus

Kashee Soondurce Debia and others (Defendants) *Respondents.*

Messrs. A. T. T. Peterson, J. W. B. Money, and *R. T. Allan,* and *Baboo Dwarkanauth Mitter* for Appellants.

Messrs. R. V. Doyne and *G. C. Paul* and *Baboos Kishen Kishore Ghose, Juggadanund Mookerjee, Sreenath Doss,* and *Ashootosh Dhur* for Respondents.

Suit laid at Co's Rupees 3,38,394-14as. 13gds.

Deeds of adoption executed long ago, several witnesses to the execution of which having died, should be judged of more from their internal probabilities and from the indirect evidence (the same being closely scrutinized), than from the testimony of witnesses either subscribing the deeds or present at the time.

A reversioner is bound to explain the cause of his delay in not suing for a declaration of his rights when obviously prejudiced by the adoption of two sons in succession.

* It has been suggested that this case also should be included in the present No., as being a very important case never before published, concerning the history of a well-known native House in Lower Bengal.

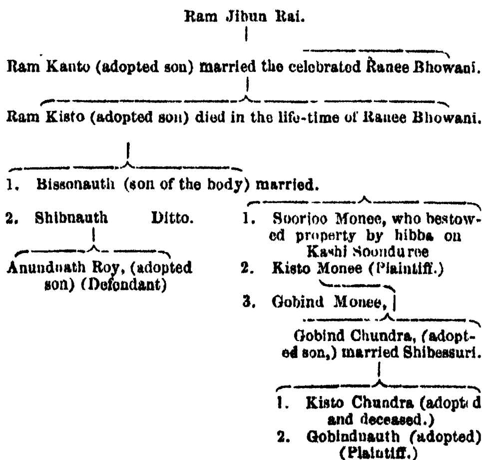
THIS is an appeal, practically, to establish the validity of the adoption of Gobind Nath Roy. The position of the parties to this and to other suits, regarding part of the Nattore property, is fully and clearly described by the Judge of the Lower Court, and it needs not be recapitulated at length in this place.

The history of this litigation will also be found in the reports of the Sudder Dewanny for 1857, pages 1126 and 1843, and in the reports for 1859, page 549.

Under the orders of the Sudder Court last quoted, passed in review of judgment, the former proceedings of the same Court disallowing the adoption were set aside, and the case was remanded to be tried, not in Moorshedabad where it was originally instituted, but in Rajshahye, after a fuller enquiry into the merits and the evidence than had yet taken place.

This has now been done; and the Judge, Mr. L. S. Jackson, after taking all the evidence available, and after making a very complete enquiry, has, in a full and well-written judgment, disallowed the adoption of Gobind Nath, and has discredited two deeds said to have been executed by the late Rajah Gobind Chunder on the 25th Agraun 1243, the one being a deed of *Unnoomoti Putro*, or permission to adopt, in favor of his wife Shibessuri, and the other a deed of management or *Kurtritwo* in favor of his mother, the Ranee Kistomoni.

For a clear understanding of the history and position of the family, the family tree is subjoined—



The whole case relative to the deeds in question was fully and ably argued before us by the learned Counsel named in the margin for three days, from every point of view; and we have carefully considered the evidence and have formed our conclusions, having regard to the ability with which the case has been argued, to the importance of the interests which it involves, and to the care and fulness with which the enquiry has been conducted by the learned Judge of the Court below, who has since been raised to a seat in this Court.

For Appellant.
Mr. A. T. T. Peterson.
" J. W. B. Money.
For Respondent.
Mr. R. V. Doyne.
" G. C. Paul.

Before analysing the evidence direct and internal, and before considering the probabilities and presumptions, we think it advisable to note the events which took place at the death of the late Rajah, which, as facts, are either established beyond the possibility of a doubt, or are not questioned or denied by the Counsel for the defendant Anund Nath.

The last Raja of Nattore, Gobind Chundra, had had constant disputes with his mother, the Ranee Kisto Monee, who is still living, regarding the management and control of the property. When still a young man, he fell sick of a fever in Agraun 1243, or December 1836, and on the morning of 26th of Agraun, he set out from the palace at Nattore, leaving his wife Shibessuree there, and reached Rampore Beauleah that evening, at which station he passed the night. On the following morning, he crossed the Ganges and journeyed to Sydabad, near Moorshedabad, which place he reached about night-fall. That evening he had an interview with his mother, the Ranee Kisto Monee, who was residing at a house there; and about 10 o'clock at night he died on the banks of the Bhageerutty or Ganges to which he had been removed according to the custom of the Hindoos when in mortal sickness.

The next day Ranee Kisto Monee went to Nattore, and within six weeks from the time of her son's death, the two deeds, which are now the subject of dispute, were filed in the Collectorate of Rajshahye, at Rampore Beauleah; whence they were returned to be presented before the Judge of the same District about six months after the Raja's death, or in June 1837.

At the time of his death, the Raja had one daughter, named Huro Sooonduree, who died in 1250. In 1254, under the permission contained in the first of the documents now disputed, a son named Kisto Chundra was adopted by the Raja's widow Shibessuree; and he dying within the year, the present claimant Gobind Nath was adopted in 1255. Opposition to his claims and rights as adopted son was first made by Anund Nath in the Civil Court in 1849 or 1256, when Ranee Kisto Monee brought the suit against Kashee Soonduree Debia for certain properties, in which suit it was finally determined by the Sudder Court that the plaintiff must prove the adoption, as the title to sue on which she relied. These being facts as to which there can be no question, we now proceed to examine the direct evidence to the two deeds. They are both dated the 25th of Agraun 1243, or the day before the Raja set out on the journey which terminated in his death. The deed of *Unnoomoti*, or permission to adopt, is signed by nine witnesses. That of management or *Kurtritwo* is signed by ten persons. With three exceptions, the names of the witnesses are the same on both deeds; that is to say, the name of Shitul Ghose, which appears in the *Unnoomoti*, does not appear in the deed of management; and the names of Kishoree Doss and Poran Doss, which appears in this last deed,

do not appear in the *Unnoomoti.* Of the above witnesses, the evidence of Ram Mohun Doss was taken by the Judge himself in 1860 in this case; that of Shitul Doss was taken previously by the Principal Sudder Ameen of Moorshedabad when the case was before the Lower Court for the first time. The other witnesses are shown, in evidence, to be dead.

Of the evidence of these two witnesses, it is sufficient for us to say that it gives clear details as to the particulars of the Raja's illness, as to the preparation of the two deeds at the direction of the Raja and his servant Haris Khan, as to the drawing out of rough drafts and of fair copies, the latter of which were written by Kisto Dhun Mojoomdar and Bhyrub Sircar respectively, and as to the Raja's journey and death.

There are no material discrepancies in the evidence of these persons, and the same is further corroborated by the testimony of Hari Pershad Roy, the father of Shibessuree and father-in-law of the late Raja, of Nitan Chunder Roy a kinsman, and of several of the Kobirajes or native medical attendants, and other servants who waited on the Raja at the time.

We may here discuss the arguments based on the absence of neighbouring rich zemindars and persons of influence from the signing of the deeds.

Looking to the youth and brief illness of the Raja, we do not think it reasonable to expect that he should have summoned any such persons to be present, seeing that he was unaware of his danger until the evening of the 24th. Servants in such cases are the natural witnesses and the only persons likely to be admitted to the sick-chamber. By the term "Khansamahs," morever, we must not understand persons who make purchases of edibles in the bazar. They are really persons in charge of important departments in the Nattore household, not menial attendants, and in virtue of their office and services they are not unnaturally entitled to the confidence of the Raja. One servant had charge of the Toshakhanah, which, in such a family, must have contained property of much value. Any argument, then, on the absence of such neighbours, under such circumstances, can go but a very little way to impugn the deeds.

But we may at once state that important deeds and transactions of this kind must be judged of such more from their internal probabilities and from the indirect evidence, than from the testimony of witnesses either subscribing the deeds or present at the time. In the case of deeds recently propounded or under totally different circumstances, evidence such as described above, though not legally insufficient, would probably be inadequate to create a belief in the deeds, or might even be open to suspicion.

In the present instance, looking to the length of time which has elapsed and to the proved death of several of the witnesses, we can only say that the plaintiff has brought into Court all the evidence available for her view of the question.

We next come to an examination of the deeds themselves. They are both engrossed on stamp paper of a Rupee's value. One piece of paper was bought by Ram Lochun Nundee on the 4th of Agraun 1245, corresponding with the 18th of November 1836, from one Gobind Sircar. The other was bought by Khoodiram Roy from Ramendro Narain Bagchee on the 14th of Kartick of the same year, corresponding with the 29th of October.

Very little stress, either way, can be justly laid on such bare facts, looking to the remoteness of the transaction.

Much stress has, however, been laid by the Judge below as well as by the learned Counsel before us, on the length of time which these documents cannot but have required for their actual drafting, and on the asserted physical impossibility that they could have been drafted and copied within the time stated by the witnesses, who assert that the writing commenced about 4 *Dundos* of the day, or about 7-30 or 8 o'clock, and that every thing was finished (copies, signatures, sealing, and delivery) by 9-30 or 10 o'clock.

Now, on this, we have to remark that the deed of permission, excluding the usual formula comprised in three broken lines, only extends to 14 lines written in a large and bold hand.

The deed of management, also excluding the formula at the commencement, is considerably longer, extending to 42 lines written in a smaller hand. Now, if the Raja were clear in mind as to his intentions, and two people were employed, as is stated, we have no hesitation in saying that such deeds might be copied, signed, and delivered within the space of one hour and a half or two hours at furthest. Moreover, an argument for the plaintiff's view of the case may be raised on this very point of the time occupied in writing out the deeds. The Raja remained at Nattore *during the whole of the* 25th, and did not set out on his journey until the morning of the 26th. Supposing the deed fabricated and the evidence in support of the same to be false, there would be no need for the witnesses to compress the transactions into the comparatively short space of two hours. They had the whole day before them, and they might as easily have described the transactions as extending over half, or the greater part of the day. That they declare the writing to have been begun in the morning and to have been ended by about 10 o'clock, may lead us, when we look at the extent and nature of the deeds, to the belief that they only spoke the truth, and described what they actually witnessed.

But it is argued for the respondent that, granting the deed of permission to be simple and easy of transcription, the deed of management is complex and intricate, and such as would require considerable time. The Judge finds that it contains no less than 12 different provisions; but, after a careful scrutiny, we do not find that the main provisions of the deed are more than 9, as follows:—(1) a recital of the deed of permission; (2) a provision for the management and care of the minor to be adopted, and for supervision by the Court of Wards; (3) a provision for religious

worship, for which the funds were to be provided from a specified estate; (4) a monthly allowance of 200 Rupees for the widow Shibessuree; (5) maintenance for the daughter Huro Sooduree, who *might*, the deed says, receive a landed estate on marriage; (6) provisions for the payment of a mortgage to one Kali Baboo; (7) the creation of a small putnee talook for the nephews and grandson of Kisto Moni; (8) mesne profits due from one Kashi Komul Chuckerbutty to go to the wife and not to the minor; (9) information of the disposition of the property to be given to the authorities.

It is argued for the defendant that some of these provisions for the support of the nephews and grandson especially, ought to excite our suspicion; and that the widow is left with a poor pittance for her monthly support, and a sum of money to be recovered and paid down. But the widow has made no complaint, and the talook to be created for the nephews is shewn, on the other hand, to be of moderate extent and value. Such provisions would only have afforded grounds for doubt and suspicion in conjunction with other fundamental circumstances of the case, in which the probabilities appear to us the other way. We admit, however, that these provisions are diversified and, to some extent, complicated. But there is not more complication in them than would be quite natural in the case of a man who wished to provide broadly for the management of his large estates, and for the succession to his name, with the addition of a few minor details regarding other members of his family. The late Raja is described as a good man of business. There is good evidence that, on the day before the alleged execution of these deeds, the Raja was warned by his family physicians of his critical position, and we can have but little doubt that, had the Raja's confidential adviser, Hurris Khan, who appears to have had a thorough knowledge of his affairs, been yet alive, he could have clearly and satisfactorily explained any thing which now, owing to lapse of time, failure of memory, or fading impressions, appears to require elucidation in these important deeds. We think it extremely probable that during the night of the 24th, Hurris Khan was really employed in preparing the drafts from the Raja's own instructions.

There is some slight obscurity, we remark, in the expressions relative to the contemplated interference of the Court of Wards; and it would seem as if some sort of regulation or control over the expenditure, by that Court, had been really contemplated. But any incongruity of this kind in a deed drawn up somewhat hastily, is no more than what we should expect; and looking to the style, provisions, text, and actual writing of the larger deed, we cannot undertake to say that there is any thing in this particular aspect of the case which should excite grave suspicion or give grounds for incredibility.

With regard to the alleged signatures of the Raja on which the Judge has laid some stress, we can only say that they appear to us those of a man not in very strong health; and the irregularity in the letter *m*, noticed by the lower Court, may perfectly well have been caused by the weakness of the signer. No attempt has been made by either party to bring other signatures of the deceased Raja, in order either to corroborate or to disprove his hand-writing.

This last consideration brings us to the arguments which have been founded on the state of the Raja's health at the time of execution. The evidence for the defendant, including that of Anund Nath himself, would make the Raja to be so ill on the 25th as to be incapable of attending to business, or even of signing his name. If we believe their testimony, the Raja was then in the last stages of a violent fever, which had clouded his intellect and enfeebled his body. If we believe the version of the plaintiff, the Raja, though ill, was cool and collected, and quite capable of turning his attention to his worldly affairs. But a considerable light is thrown on this part of the controversy by the deposition of Aradhun Sandyal a respectable Mooktear, cited by the defendant, from whose evidence it is quite clear that, on arriving at Rampore Bauleah on the evening of the 26th, more than 30 miles from Nattore, or the day after the deeds are said to have been written, the Raja was composed, and able to enter into conversation regarding his worldly affairs. And on the facts proved or admitted as regards the journey, it seems clear to us, that a person capable of going for two days successively in a palanquin, throughout the whole day, and of crossing several rivers including the wide river Ganges itself, *could not* have been, on the morning of the day before he so set out, in a state of insensibility or in that comatose state which precedes immediate dissolution.

Had this been his real condition on the 25th, the Raja would have held no conversation with any one at Rampore Bauleah on the 26th, and in all human probability would have died in his palanquin a few hours after he had started.

We now come to the consideration of the inherent probabilities or improbabilities of this remarkable case. Now, in the first place, it is beyond a question that adoption in the Nattore family has been the rule, and not the exception. For a century and a half the succession has, in one single instance only, been continued through a son born of the body. It was, therefore, most natural that a Raja desirous of leaving a son to perform the necessary ceremonies after his decease, should think of adoption. And it would also be quite natural that Raja Gobind Chundra, not 25 years old, having a wife who was still young, and to whom he seems to have been attached, who had borne him a daughter, and who, therefore, might, at any time, bear him a son, should not think of recourse to what had been the leading principle of his family, until warned that his illness might terminate fatally. There is no evidence to show that he was ever on bad terms with his wife Shibessuree who was living at Nattore with him, and there is thus no reason arising out of her position and his own,

why he should not wish to make the deed of permission in her favor, if circumstances required it.

But, it is very forcibly argued, if he were on good terms with his wife, he had been on very bad terms with his mother. Litigation, fierce and protracted, had been carried on between them. The mother had openly termed her son an "outcast," and had heaped other insults on him, which he was not likely to forget or to forgive. Yet, it is in favor of this mother, that he creates a deed of management vesting her with the absolute control of the property, while the wife is left with a comparatively small pittance of 200 Rupees a month in addition to a moderate bonus. The Judge has laid considerable stress on the quarrel between mother and son, and has perhaps not allowed sufficient weight, as we think, to the possibility of returning affection and duty, which at such a crisis might be reasonably supposed to operate powerfully in the breast of a young man. We all know that, in the heat and excitement of a standing family-quarrel between relatives in Bengal, words are inserted by Mooktears and agents in petitions and plaints, to which the principals, even at the time and certainly afterwards, attach little weight. It is certain that in his last illness, the Rajah did undertake a journey of two days in order to see his mother, and went farther with this object than was absolutely necessary if the said journey had been undertaken only that he might die on the banks of the Bhagirutti. It is equally certain that he did see and speak with his mother, and the evidence of the Mooktear* cited by the defendant, and already quoted, shows that the Rajah had expressed to him, in conversation, his apprehension that "no luck would attend him as long as he was at variance with his mother." It is true that this witness also denies that the Rajah spoke of any deeds as having been executed. He says that the Raja intended to leave a deed of permission and told the deponent so; and that the Ranee herself, shortly after her son's death, said nothing about the existence of any deeds. But we are inclined to think, as put to us by the Counsel for the appellant, that this witness may not have told all that really passed between himself and the Rajah; in short, that he has told only as much as he could not well help telling, and has kept back expressions or disclosures which might damage the cause of Anund Nath. It is certain that this witness, though described by the Judge as highly respectable, cannot be supposed well-inclined to the Ranee, who, he admits, stopped his wages when the family-quarrel began.

*Aradhun Sandyal.

On the whole, on this part of the case, we are of opinion that, with the facts proved beyond question, we can well afford to believe that, in his last illness, the Raja was sincerely desirous of a reconciliation with his mother, who was also his spiritual guide and adviser; (he being her *muntroshishyo*, or disciple); and that, as a means of propitiating her, he may have gone prepared with a deed which, in the event of his decease, would place her in the position of influence and command of the property for which her talents had really fitted her.

Nor is this supposition at variance with the position and conduct of the Ranee Shibessuree her daughter-in-law. This lady had no interest in the validity of the deed of management. It was altogether opposed to her claims as widow with a life-interest, and it tended to reduce her to a subordinate and unimportant position. Yet, she wholly acquiesces in the production of the deed, and we are asked to believe that her silence is purchased by a pension of 200 Rupees a month, and by a bonus to be handed over to her from certain mesne profits which were due by a third person. Not only does the wife acquiesce in her own severance from all control over the property, but her father Huri Pershad Roy, who was actually present at Nattore during the Raja's illness, sits down contented with a disposition which excludes his own daughter from the estates, and thus deprives him of the indirect advantages which he would obviously have derived, had the management of extensive landed properties remained, until the majority of a son to be adopted, in the hands of his own daughter. Moreover, Huro Soonduree his grand daughter, had there been no adoption of a son, might have given, through her own person, an heir to the house of Nattore. From all this prospect the adoption cut him off.

We must hold on this, that the silence of the father-in-law and of the widow of the Raja, is remarkably inconsistent with the theory that the deed of management is a fabrication.

We must now look at the conduct of Anund Nath himself, who has most properly been examined in this case. We learn, from his own mouth, that he was at Nattore when the Raja was taken ill; though his statement, that the Raja was then *in extremis*, is quite discredited by the evidence of Aradhun Sandyal, as already commented on, and by the fact that the Raja lived for three days afterwards and went a journey of 60 miles. We learn too that he became, as he says, aware of the forgery of the deeds very shortly after the Raja's death, when they were presented to the Collector. Now, fully admitting that while Huro Soonduree, the daughter of Shibessuree, lived, Anund Nath could not in law have any valid claim to the estates, we must still remark that it is not unusual with natives of Bengal, who, as relatives or connections, have any interest however remote or uncertain in any property, to enter protests or to advance claims, when their rights, even if dependent on contingencies, seem to be imperilled. We say that it would have been consonant to the universal practice of Bengalees, had some protest been entered by Anund Nath to the production of deeds before the authorities, which deeds, he says, he, at the time, knew to be fabrications. Expectant or possible reversioners do not consider their own claims in the light in which they would appear to learned Advocates or to unbiassed Courts of law. But granting that there was no legal

ground for Anund Nath to move during the life-time of the daughter, there was every reason why he should bestir himself, as soon as the death of the only surviving daughter made him reversioner to the Nattore estates. What then is his conduct at this juncture, which, by his own account, was so important to his interest? Huro Soonduree died in the year 1250 or in 1843. Anund Nath never uttered one word about his own claims until 1849, and then only appeared as a third party in a suit promoted by the Ranee Kistomonee herself. There has been considerable contention regarding a letter, dated the 12th Choitro 1252, which is produced against Anund Nath, and in which he is made to reply to the Ranee that he would look out for a second son to replace the first adopted son who had just died. The Judge remarks that Anund Nath but faintly denied his signature in this letter; but whether he did really sign the same or not, it is quite certain that he saw and recognised the two boys successively adopted and that he was present at the investiture of one of them with the sacred thread. He attempts to explain this away by saying that he thought that they were children brought up (Paluk) not adopted, by Kistomonee; but looking to *his* residence in a part of the Rajbari, to his conduct, and interests, and motives, and to the tenor of his evidence, which left a very unfavorable impression on the Court below, we have only to say that we can place no confidence in his assertions, and hold that, if the case of the appellant were a false one, Anund Nath has done his utmost to make it appear true.

A remarkable contrast to his testimony is to be found in that of Kisto Monee, which, for a lady of her age, is given with much force and consistency, and which is very clear as to the delivery to her by Rajah Gobind Chunder of the deed of management at Sydabad, and as to their conversation and complete reconciliation just before his death.

Considerable stress has been laid by the Judge and by the Counsel for the respondent on the delay of six weeks which took place in the presentation of the deeds to the Collector, followed by their production before the Judge four months afterwards. We are called on to consider the probabilities of the two deeds having been fabricated in this interval, by the Ranee Kisto Monee and her agents, relying, as they might have done, on any supposed and unfulfilled intentions of the late Rajah. We do not think that the supposition of forgery in the six weeks between the beginning of December and the end of January is credible or consistent with the other parts of the case, and we can only say that this period, looking to the habitual procrastination of natives and especially of native ladies, appears to us an unusually brief period; and what, it may be asked, is the delay of six weeks with which the plaintiff is thus taunted, compared to the delay of more than six years which Anund Nath suffered to elapse before he challenged deeds which, by his own evidence, he had long known to be forged? There is also, we remark, some evidence which goes to prove the existence of a misunderstanding between Kisto Monee and Shibessuri just after the Rajah's death; and what delay did occur, may reasonably be set down as necessary for the adjustment of this difference before the deeds could be produced to the authorities?

On this head of our enquiry, we can then only say that, if early and bold publicity in the proper Courts be essential to belief in the genuineness of wills, adoptions, and similar deeds, these deeds possess that element in a very remarkable degree.

We have considered the theory of the respondent that the deeds were cunningly devised with just such a mention of the Court of Wards as would justify their production before the Collector, but with such conditions inserted therein as would and must warrant the Collector in rejecting an application to take charge thereof. We cannot consider this theory entitled to our support. The mention of the Court of Wards where the adoption of a minor was contemplated, was perfectly natural; and the reasons which induced the Collector to refuse the charge of the estates, namely, that they were joint and undivided, seems to us not quite conclusive. There surely must have been some estates appertaining to the house of Nattore, to which its Rajah would be solely entitled, which were not held in joint tenancy, and over which the supervision of the Collector might properly have been exercised. In any case the mention of the Court of Wards by a person who contemplated a minority for a son to be adopted after his death, would be perfectly natural.

Some consideration is due to the manner in which this case was actually brought into Court. The Ranee Kisto Monee, confident, it would appear, in the security of her title and in the validity of the adoption, comes in on that title, in one case to dispute the validity of certain bequests, made by Joymonee, another of her late husband's wives, of property which was considered by the plaintiff to belong to the representative of the house of Nattore, to third parties; and in another case, known familiarly in this litigation as the 17 *beegahs* case, she sues to recover that amount of property from Anund Nath usurped by him as the heir of the younger branch. It is in these suits, in neither of which was Anund Nath plaintiff, and in one of which he was only an intervenor, that Ranee Kistomonee was eventually put to the proof of her own title; and we remark that one learned Judge dissenting from his colleagues, (page 645 of Decisions for 1856), was of opinion that, by long possession and by contemporaneous evidence of the deeds, the plaintiff had established her title to sue, and that any suit to impugn that title should be raised directly by the party entitled to raise it.

Without, however, laying much stress on the above, we must remark that, according to the law and practice of our Courts, Anund Nath, as reversioner, after the death of the daughter, would have been clearly entitled to sue for a declaration

of his rights, which were obviously prejudiced by the adoption of two sons in succession. Such a suit he might have brought, though he might not have been able to enter on possession during the lifetime of the Ranee, widow. There is consequently no explanation of his great delay in seeking to enforce his rights after 1250.

And if, owing to such delay, the plaintiff has been prevented from obtaining more contemporaneous testimony, we cannot suffer her to be prejudiced in weighing probabilities, by omissions solely due to the conduct of her opponent. We now, therefore, sum up the total evidence direct and indirect, as follows. The direct evidence is really as good as we can expect, considering the length of time that has elapsed since the Rajah's decease. The state of the Rajah's mind and body is conclusively shown to be such as would permit of his attention to business. The signature is that of a man somewhat weak. There is no physical obstacle whatever to the preparation of the deeds within the time specified. The terms and provisions of the larger deed are not more than could have been drawn out by a sharp man of business, acquainted with the property and with the position of the members of the family, at such a crisis in one night, at his master's bidding. The reconciliation of son and mother is just what we might expect; and the disposition of the property, including the various bequests, is not inofficious; while, if any one was in reality prejudiced, that person is the widow who has remained consenting and silent. The early publicity of the deeds before the authorities is a strong argument in their favor; and the delay of Anund Nath with his admitted knowledge and his habitual residence within the very precincts of the Nattore Rajbarie, as disclosed by the suit regarding the 17 beegahs, is utterly inconsistent with his genuine belief in the fabrication of the documents and in the validity of his own claims. The history of the family, the prevalence of adoption in the same, the remarkable ability displayed by the wives of Rajahs in successive generations, and the position of the various parties, are all powerful arguments which add weight to the others, and which lead us to place implicit confidence in the two deeds which form the subject of this protracted contest.

In this view, we reverse the decision of the Lower Court and declare the deed of permission to adopt and that of management to be genuine, and the acts done under those deeds to be legal and valid.

This decision will govern the appeal in No. 414 also, as far as Anund Nath Roy is concerned; and he being thus declared to have no status as heir at law, can have no title to sue for estates granted away by Ranee Joy Monee.

The Ranee KistoMonee, appellant, will be entitled to all her costs in this appeal in both Courts.

The 30th April 1863.*

Present :

The Hon'ble C. Steer and W. S. Seton-Karr, *Judges.*

Nattore Estates—Deeds of gift by Ranee Bhowanee (Mode of construing.)

Case No. 414 of 1860.

Regular Appeals from a decision passed by Mr. L. S. Jackson, Judge of Rajshahye, dated the 26th September 1860.

The Collector of Moorshedabad and others (Defendants) *Appellants,*

versus

Koomar Anund Nath Roy (Plaintiff) *Respondent.*

Mr. J. Newmarch and *Baboo Juggadanund Mookerjee* for Appellants.

Baboos Kissen Kishore Ghose and *Sreenauth Doss* for Respondent.

Suit laid at Rupees 5,63,086.

Case No. 28 of 1861.

Maharanee Kistomonee Debia and Gobind Nath Roy (*Plaintiffs*) *Appellants,*

versus

Koer Anund Nauth Roy (Plaintiff) and Kashee Soonduree Debia and others (Defendants) *Respondents.*

Messrs. A. T. T. Peterson, and *R. T. Allan* and *Baboo Dwarkanauth Mitter* for Appellants.

Baboos Sreenauth Doss and *Taruck Nauth Sein* for Respondents.

Suit laid at Rupees 5,60,083.

A deed of gift should be interpreted by itself, according to the whole of its context, to the expressions it contains, and the intention of the party making it. Any other direct evidence to explain the surmised or alleged intention of the donor would be inadmissible.

THESE are cases somewhat connected with that of the succession to the Nattore properties by right of adoption. In our separate judgment in that case, we have reversed the Judge's decision and have restored the position of the adopted son, Gobind Nath Roy. It follows, necessarily, that Anund Nath who sued Kashee Soonduree, the daughter-in-law of Ranee Joymonee, to recover certain properties granted in *Hibba* or gift to her by the Ranee, is now necessarily out of Court; and he cannot be heard as respondent in the appeal against the decision of the Judge, inasmuch as he, Anund Nath, is no longer to be regarded as one of the heirs of Raja Biswanath.

The Judge has, however, gone fully into the case of the above Hibbas, and the appeal will now be proceeded with in regard to them, and in respect of the claim of Kistomonee and Gobind-Nauth; the latter of whom is now, in our view of the case, the regularly adopted son of Raja

* It has been suggested that this case also should be included in the present No., as being an important case never before published, and relating to the well-known House of Nattore.

Gobind Chundra, and the heir of Raja Biswanauth.

We shall confine our remarks to that portion of the Judge's decision which concerns the validity of the deeds of Hibba, considered in connection with the claim and status of the Ranee Kistomonee and her grand-son.

Ranee Kistomonee sued originally to set aside these deeds, alleging them to be false and fraudulent. The case regarding them stands thus: Maharanee Bhowani executed five deeds of gift in favor of her daughter-in-law Ranee Joymonee in 1205 and 1209. One only was executed in the former year, and the remaining four in the latter year, shortly before the death of the donor.

The fact of the execution of these deeds by the Maharanee has never been seriously questioned. It seems to be admitted on all hands that the Maharanee was highly respected and looked up to, and that she had absolute control and power over the Nattore property; and the only question for us to decide is, what was the object and intent of the Maharanee in making these grants, and did they confer the property on Ranee Joymonee to deal with and grant away or sell, just as she might think fit?

The Judge, after analysing the contents of the five deeds which are very short, has held that the grants numbered 3 and 4, made by the Maharanee, conveyed an absolute title to Joymonee, and that the subsequent alienations by Joymonee to her daughter-in-law, under the above title, are good and valid.

The remaining alienations, under three of the original grants, the Judge has set aside.

We may here at once state our decision regarding the alienation of the property covered by deed No. 4. The deed is dated the 12th of Bhadro 1209. It is a gift of the dwelling house at Burranugger, together with the premises, gardens, tanks, and fruit trees attached thereto: and it contains an express provision that the donee might "sell or give away the property, and that the heirs of the donor should have no connection with or claim on the same."

Now, that this deed conveys an absolute indefeasible title, with power to the donee to deal with the same as she pleased, we can have no sort of doubt; and it follows that the transfer of this property to Durga Chunder, dated the 19th of Bysack 1242, and the claim of the minor Koylas, the son of Kashee Soonduree, to the same, is good and valid, and we entirely affirm the Judge's finding on this head.

As regards the other deeds, we think it expedient to note in this place two objections which were taken by the pleader for the Court of Wards, though the latter of them has really no bearing on our decision. The first objection is that, the properties being distinct in the deeds of gift, Ranee Kistomonee should have instituted separate suits for the same, under Sections 8 and 9 of the Code of Civil Procedure. We think that there is no substantial ground of objection on this head. No injury has been caused to any one by the plaintiff's having challenged the deeds and alienations in one single suit; and, moreover, such an objection is made at a very late period in the litigation. We, therefore, over-rule it.

The second point refers to the claim which Anund Nath might have had, had he been legally in Court as an adopted son to inherit the property of collaterals. The Judge, following the decisions of the late Sudder Court, page 1863 of 1858 and page 411 of 1860, holds that he can so inherit.

There has yet been no decision of the Privy Council on this point. But it is contended that this ruling of the Judge is opposed to that of the *Dayabhaga*, though it may be consonant to Menu. We note the point as urged by the pleader; but our view of the rights and position of Anund Nath renders our decision on this point superfluous.

We now come to the remaining four deeds of gifts. The Judge has taken the first of the deeds to be the key to the whole, and has apparently made use of the same in order to interpret the others.

This deed relates to property in the District of Jessore appropriated to religious worship; and the Maharanee looking to the incompetency and extravagance of her son Biswanauth, to the minority of her son Shibnauth, and to the duty and affection invariably shown her by Joymonee who had had male offspring, appoints her *sevait* of the property, with a view to her maintaining the worship, and gives her power herself to appoint a *sevait*. The phrase is also used that the worship was to be carried on by Joymonee "putrá poutradi kranié" or, by her and his heirs for ever.

This property was, it is stated, given to Kashee Soonduree by a deed dated the 12th of Phalgoon 1254, shortly before the death of Joymonee.

The Judge holds that it was the intention of the Maharanee to give this property to her daughter, to the exclusion of the natural heir, namely, Rajah Biswanauth; but the Judge also holds that Joymonee had no more than a life-interest in this property, and that her gift to Kashee Soonduree was entirely null and void.

The Judge is of the same opinion with regard to the land in grant No. 2 and No. 5, the first of which relates to purchased estates at or near Burranugger, where is situated the residence mentioned in deed No. 4. In this the same expression "putra poutradi kranié" is used; and the Maharanee bestows the property on her daughter, telling her to get her own name entered after the death of the donor, and reciting that any claim made by the heirs of the donor will be null and void.

Deed No. 5 bestows certain estates and gardens appropriated to the worship of the Gods. The donee is to continue in possession "putra, &c.," and is to enter her own name as *sevait*, and to carry on the worship of the idols.

There remains, then, only the deed No. 3 which also relates to properties set apart for religious worship at Burranugger. The donee is to enter her own name as *sevait*, and the

consequences of any neglect in the worship are to be on her own head.

The Judge has termed this "an absolute gift, clogged with no condition or restriction whatever," though he remarks that the power of alienation is not expressly given, nor withheld; and he seems to think that the right of the Maharanee may have been only that of a *sevait* for life. But reading this deed in connection with No. 4, the Judge has come to the conclusion that it gives the donee an absolute control over these estates, with liberty to alienate them.

Now, on the above, we must remark that we entirely differ from the Judge as to the principle on which he has proceeded to interpret these deeds. We cannot consider that deed No. 1 is the key to the whole. Each deed, we think, should be interpreted as much as possible and considered by itself; and if any deed can be considered as of paramount significance in showing what the intention of the donor was, it should be, not deed No. 1, but deed No. 4. We believe the sound rule of law to be that each deed should be interpreted by itself, according to the whole of its context, to the expressions it contains, and the intention of the party making the deed, and that any other direct evidence to explain the surmised or alleged intention of the donor would be inadmissible. But when, on the above principles, we consider each deed separately, we cannot wholly disregard the great difference between deed No. 4 and all the others.

Now, applying this rule to the facts, when we find that one deed contains an express permission to the donee to sell or transfer, we may fairly hold that it was the intention of the donor to limit this power to that deed alone; and that other deeds in which no power of alienation is expressly mentioned must be construed according to their intent, to be collected from each instrument in turn. Now, granting that by the first deed, the Maharanee intended to keep the property out of the hands of an incompetent and spendthrift son, it was still her object, we think, to keep the property in the family; and looking to the ends to which the proceeds of the estates in Nos. 1, 3, and 5 were to be devoted, namely, to the worship of the Gods, we hold that the donee and her natural heirs were to continue as *sevaits*, or were to have the power of appointing other persons *sevaits*. We cannot hold that the Maharanee contemplated that the right of superintending the worship or of appointing superintendents, was to pass into the hands of strangers. The very nature of the property in each case seems to justify this reasoning. Deed No. 4 related to a dwelling house, which it might be expedient to sell or transfer, and as to which, at any rate, it was undesirable that the donee should be fettered or restricted in any way.

Therefore, here, we have an absolute power to alienate in so many words. In deeds Nos. 1, 2, and 5, there could be no such consideration of expediency, but the very reverse; and, therefore, we find no such words of unqualified control and disposal. In this view, we cannot consider the mere use of the words "putra poutradi kranié" as equivalent to words of general conveyance, or as giving away an estate in fee simple.

There remains then only the deed No. 3. It relates to property held in trust for worship. Looking to this and to the express words of deed No. 4, already noticed, we do not think ourselves warranted in holding that this deed, like No. 4, was an absolute conveyance. That the property was attached to or near the private residence at Burranugger would not, we think, justify its passing with the said residence, in the absence of express language to that effect.

As regards the subsequent alienations by Joymonee herself, our conclusion as to the intent and effect of the deeds renders it unnecessary for us to say much. But we concur with the Judge in his remarks as to the identity of Huro Nauth and Doorga Chunder, which we regard as set at rest by the evidence of Gobindmonee, the youngest surviving widow of Raja Biswanauth. We can have no doubt that the above persons were one and the same. But the conduct of Joymonee herself in regard to these alienations quite supports our view of the legal effect of these deeds.

The Judge finds that, in spite of the alleged alienations, the Ranee Joymonee retains possession of the property said to have been given away by her, years before (except in one instance, No. 1) until her last illness, and Doorga Chunder *alias* Huro Nauth, who attempted to get forcible "possession," was apprehended and sentenced to three years' imprisonment by the Sessions Court for a riot.

We further agree with the Judge that the evidence to the deed in favor of Kashee Soonduree regarding her property in No. 1 is wholly untrustworthy. That property was given away by Joymonee in a deed dated a few days before her death, but registered only on the very day of the death, and we have only to say that we entirely discredit the same: and the evidence of Shiramoni, a most respectable witness, is not precise enough, in our opinion, to restore the credit of a deed which rests on attesting witnesses so utterly discredited as they have been.

Our decision, then, will be substantially the same as the Judge's, with exception to No. 3, though we have arrived at this conclusion by a somewhat different process of reasoning. We thus affirm the transfer of property No. 4, and hold the transfer of all the others, namely, of that contained in deeds 1, 2, 3, and 5 to be invalid. The property designated therein will consequently return to the adopted son Gobind Nath as the undoubted heir of Rajah Biswanauth. With this modification, the decision of the Judge is substantially affirmed. Gobind Nath, and not Anund Nath, will recover from Kashee Soonduree the properties in Nos. 1, 2, 3, and 5, with mesne profits to be ascertained in execution.

Costs in proportion to the Appellant. This decision dismisses the appeal of the Collector of Moorshedabad, and decrees that of Ranee Kistomonee.

The 1st June 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

Suit for enhanced rent—Liability to enhancement disputed—Declaratory decree for enhancement (without proof of notice)—Plea of Lakheraj—Proof of payment of rent.

Case No. 2463 of 1862.

Special Appeal from a decision passed by Mr. A. G. Davidson, Second Principal Sudder Ameen of Hooghly, dated the 18th July 1862, modifying a decree of Baboo Gunga Churn Sircur, Moonsiff of Jehanabad, dated the 21st March 1861.

Goomanee Kazee (one of the Defendants) *Appellant*,

versus

Huryhur Mookerjee (Plaintiff) *Respondent*.

Baboos Aushootosh Dhur and *Khetter Nauth Gangooly*, for Appellant.

Baboos Gopeenauth Mookerjee and *Dwarkanauth Mitter* for Respondent.

In a suit to recover arrears of rent at enhanced rates, when the question of the liability of the tenure to enhancement has been put in issue and fully tried, a decree may be given declaring the tenure liable to enhancement, though notice to enhance is not proved.

In a suit for enhancement where the defence is that the land is lakheraj, the plaintiff should prove that the defendant has paid rent. If the land has been in fact held rent-free, the validity or invalidity of the lakheraj tenure cannot be tried in such a suit. That question should be tried in a suit to resume or assess.

The plaintiff sued for rent at enhanced rates after notice. The suit was commenced on the 25th March 1859 before Act X of 1859 came into operation. The defendant, among other defences, set up that 11 beegahs 7 cottahs of the land was lakheraj. The Moonsiff, after considering all the defences, and the report of the Ameen by whom a local enquiry was made, found that the defendant was entitled to deduct from the lands mentioned in the plaint 4 cottahs as Golahghur land, and that the remaining lands amounted to 37 beegahs 7 cottahs 7½ chittacks; and he said "the correctness of the decision is not impugned by any of the parties." He also found that 1 beegah 15 cottahs 5¼ chittacks were lakheraj; and after releasing that quantity of the land he assessed the remainder at 85 Sicca Rupees 3 Annas 2 Gundahs 2 Kowries.

The Moonsiff found that notice of enhancement had been served, and decreed that the plaintiff should recover from the defendant the annual jumma of Sicca Rupees 85-3-2-2, upon a quantity of 35 beegahs 12 cottahs 2 chittacks of and from the commencement of 1265, the time when the notice was served.

Upon appeal by defendant, the Principal Sudder Ameen found that no notice of enhancement had been served. He held that the rate awarded by the first Court was not excessive, but that the appellant ought to be allowed the value of his labor; and he amended the decree of the first Court, and decreed that the plaintiff's rent should be Rupees 85 from the date of action. It is now contended by the defendant upon appeal that, as the Principal Sudder Ameen had decided that notice of enhancement had not been served, he could not award to the plaintiff rent at an enhanced rate. But it is urged, on behalf of the plaintiff the respondent, that he was entitled to a decree declaring his right to enhance the rent. The point, being considered doubtful, was referred to a Full Bench in order to settle the question. Several decisions (*a*) of the late Sudder Court and one (*b*) of this Court were cited in support of that contention. We think it clear that the plaintiff could not, in this suit, which was brought to recover arrears due before the 25th March 1859, recover any rent which became due after the suit was commenced, and consequently that the Principal Sudder Ameen was wrong in giving him rent at an enhanced rate from the date of the commencement of the action; but we further think that where the question as to the liability of a tenure to enhancement has been fully tried, a plaintiff is entitled to a declaration of his right to enhance. It was contended on the part of the appellant that, as the plaintiff did not by his plaint ask for a declaration of right, but simply for arrears at an enhanced rate, the Court cannot, in this suit, declare what his rights are. But we must not hold parties too strictly to their pleadings; and when a plaintiff asks for that to which he is not entitled, there is no good reason why the Court, in refusing the relief prayed for, should not give that to which they see he is fairly entitled upon the evidence and the finding of the issues raised in the suit. In this case one of the issues raised for decision by the Principal Sudder Ameen was, whether the land was liable to enhancement, and at what rate; and by decreeing rent to the plaintiff at an enhanced rate, he substantially decided that the plaintiff had a right to enhance and a right to recover at the enhanced rates. Although the plaintiff is not entitled to recover in this suit rent at the enhanced rates, there is no good reason why that part of the finding which is implied in the decree, *viz.* that he is entitled to enhance, should not stand. We think that we ought to follow the decisions of the late Sudder Court which are founded on good sense, and hold that the plaintiff is entitled to a decree that he has a right to enhance. The principal ground urged

(*a*.) Golam Ruhman *vs.* Rajah Radakaunth, S. D. A. Rep. 5th June 1847, p. 196.

Petition 237 of 1848, 12th September 1848, p. 812.

Joykissen Mookerjee *vs.* Kazee Golam Sufder, S. D. A. Rep. 13th May 1858 p. 1001.

Kashessurree Dabea *vs.*, Chunderkaunth Muzoomdar, S. D. A. Rep. 28th February 1858, p. 318.

Rance Mohamya Dassea *vs.* Neelmony Joogee, S. D. A. Rep. 13th December 1858, p. 1800.

Kajee Abdool Hamed *vs.* Ramcoomar Mundul and others, Kajee Abdool Hamed *vs.* Rum Mohun Lushkur and another, S. D. A. Rep. 23rd June 1859, p. 831.

Jogessur Singh *vs.* Syed Lootf Ali Khan, S. D. A. Rep. 24th September 1860, p. 225.

(*b*.) Paulson *vs.* Mudhoosoodun Paul Chowdry, dated 10th February 1863.

by the defendant why the plaintiff was not entitled to enhance, was that the defendant held under a mokurreree pottah. His reason why the plaintiff was not entitled to recover rent at enhanced rates, was that he had not given notice of his intention to enhance. The issue as to the mokurreree pottah was found against the defendant; and if the plaintiff is not entitled to the benefit of that finding by having his right to enhance declared, that question will have to be tried over again, and all the costs and expenses incurred in consequence of that issue, to say nothing of the time of the Court, will be wasted.

In this case the Court had no power to try the validity of alleged lakheraj tenure to entitle the plaintiff to recover enhanced rent for that portion of the land; he ought to have shown that it was his mâl land, and that the defendant had paid rent for it. But no evidence of the kind appears to have been given. The lakheraj was assumed by the Judge to exist, though it was declared invalid for want of registration. We therefore think that no declaration of the plaintiff's right to enhance the rent of that land can be made in this suit. The validity or invalidity of that tenure must be previously tried and determined in a suit to resume or to assess.

The 11 beegahs 7 cottahs of land claimed to be lakheraj must, therefore, be deducted from the 37 beegahs 7 cottahs 7 chittacks, which has been found to be the total amount of the plaintiff's mâl land.

The decree of the Principal Sudder Ameen must be reversed, and it must be declared to have been established that the plaintiff has a right to enhance the rent of the 37 beegahs 7 cottahs 7 chittacks less the 11 beegahs 7 cottahs claimed to be lakheraj. As this suit was substantially brought to recover the arrears and not for a declaration of right, we think that each party should pay his own costs of this appeal and in both the Lower Courts. If the plaintiff had sued merely for a declaration of right, we do not think that we should have given him his costs. The defendant was, however, wrong in setting up a mokurreree pottah which, according to both the Lower Courts, was a false document. The declaration of right will be merely that the defendant held the land upon a tenure liable to enhancement. There will be no declaration as to the rates to which the plaintiff was entitled to enhance, or whether there are sufficient grounds for enhancement. Those questions must be tried and determined when the plaintiff seeks to enforce the rights which he is declared to have.

Mr. Justice Norman.—I concur in the decision of the Court on all the points. Had the question been left with me, I should have preferred to have laid down a rule that, if the plaint is framed specifically for the purpose of obtaining a declaration that a mokurreree or other alleged title to hold at a fixed jumma is invalid, or ought to be set aside, a declaratory decree may be passed. But if, to an ordinary suit for enhancement alleging notice and praying to recover arrears at an enhanced rate, the defendant sets up two answers, such as want of notice, and the existence of a mokurreree, the establishment of the truth of either plea is sufficient to entitle him to have the suit dismissed. The plaintiff fails to prove that on which his suit is based. He may be entitled to have the finding on the issue negativing the existence of the mokurreree recorded, and to make such use of such finding as he may be able. But I should have preferred not to have given a decree which is not specifically asked for by the plaintiff, fearing that cases may occur in which the defendant may be prejudiced by being estopped by the finding on an issue on which he may not have had full warning that it was necessary to put out his whole strength. However, in deference to the opinion of my learned brothers, and to the authority of the cases referred to, I waive my own opinion, as I concur in thinking that the rule now laid down is a reasonable one.

The 1st June 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble J. P. Norman, C. Steer, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

No appeal (from order as to application and distribution of property sold in execution under decree of rival decree-holder).

Case No. 575 of 1861.

Miscellaneous Appeal from an order passed by Mr. G. P. Leycester, Judge of Shahabad, dated the 23rd September 1861.

Misree Koonwur, *Petitioner*,

Versus

Maharajah Mohessur Buksh Singh (Decree-holder) and Kisto Pershad Singh (Debtor) *Opposite party*.

Baboo Kishen Kishore Ghose and *Moulvie Syud Murhumut Hossein* for Petitioner.

Moonshee Ameer Ally, *Mr. J. Baptist*, and *Baboo Gobind Chunder Mookerjee* for Opposite party.

Section 11 of Act XXIII of 1861 does not give an appeal from an order made under Sections 270 and 271 Act VIII of 1859 as to the application and distribution of the proceeds of property sold in execution under a decree of a rival decree-holder.

This case has been referred to a Full Bench for the purpose of deciding whether an appeal lies from an order made by the Judge under Sections 270 and 271 of Act VIII of 1859, with regard to the claims of several rival decree-holders in respect of the proceeds of property sold in execution of a decree.

We are of opinion that in this case no appeal lies to this Court. The question which was raised in the lower Court was not a question arising between the parties to the suit in which the decree was passed, but between rival decree-holders. It was not a question arising between

the plaintiff and the defendant in any one of the suits; but it was a question between the petitioners in several suits, or, in other words, between rival decree-holders as to the application of the proceeds of property sold under a decree.

The question is, whether such a case is one in which an appeal is given by Section 11 of Act XXIII of 1861.

As the law originally stood, it was enacted by Section 283 of Act VIII of 1859 that questions relating to sums alleged "to have been paid in discharge or satisfaction of a decree, or the like, shall be determined by order of the Court executing the decree and not by separate suit; and the order passed by the Court shall be open to appeal."

It was subsequently found that the above provision was not sufficient: and consequently Section 283 of Act VIII of 1859 was repealed by Section 1 of Act XXIII of 1861, and a new enactment was substituted for it. By Section 11 of the latter Act, Section 283 Act VIII of 1859 was re-enacted, and after the words "as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like," were added the words "and any other questions *arising between the parties to the suit in which the decree was passed* and relating to the execution of the decree." All such questions were to be determined by order of the Court executing the decree, and not by separate suit; and the orders passed by the Court in such cases were open to appeal.

As this was not a question arising between the parties to the suit, but between rival decree-holders, we think that an appeal does not lie.

This appeal will, therefore, be dismissed with costs and interest.

Mr. Justice Seton-Karr.—I desire to add that, when these cases came before Mr. Justice Campbell and myself, we were in doubt whether each of them could be fairly treated as questions arising between the decree-holder and the judgment-debtor or party to the suit. But we thought it desirable that such points, arising between rival claimants, should be open to hearing, if the law admitted it. This opinion, however, we put forward with great hesitation, and we were only desirous that the point should be referred to a Full Bench in order that there might be an authoritative decision on the question by which, in future, Courts would be guided. In the opinion of the Court which has been come to after mature deliberation, it has been decided that an appeal does not lie in such cases, and in that opinion I now desire to say that I concur.

The 30th March 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Rent—Interest—Waivor—Special Appeal.

Cases Nos. 278, 279, and 280 of 1862.

Special Appeals from a decision of Mr. L. S. Jackson, Judge of Nuddea, dated the 28th November 1861, affirming a decree of Moulvie Yatzud Hossein, Deputy Collector of that District, dated the 13th August 1861.

Dindoyal Poramanick (Plaintiff) *Appellant,*

versus

Prankishen Paul Chowdry and others

(Defendants) *Respondents.*

Baboo Poorno Chunder Roy for Appellant.

Baboo Mohendro Lall Shome for Respondents.

The receipt of rent for 10 years by a zemindar without making any demand for interest and without applying any portion of the payments towards the discharge of interest, was held to justify the finding of the lower Appellate Court (not to be interfered with on special appeal) that the zemindar had waived his claim to interest.

It is admitted that one decision will govern these three appeals. The plaintiff sued for interest alleged to be due for a period of ten years. To give color to his claim, he introduced in each of the three suits a small balance (a fraction of an anna), alleging such balance to be the balance of the principal, the real object of the three suits being to recover interest upon lapsed instalments, according to the stipulations of the kubooleuts executed by the defendants.

The Court of first instance and the Zillah Judge, in appeal, refused to decree interest. The Judge remarks that in these cases "the zemindar, the plaintiff, had gone on for years accepting successive instalments of his rent, whether paid on the exact due date or shortly afterwards, without either taking the interest, or notifying that he intended levying it; that in such a case the defendant has been justified in considering that the payments so successively made have been accepted as prompt payments; and that the condition to pay interest was in the nature of a penalty which had been waived by the zemindar."

In special appeal, it is urged that the kubooleut stipulated for the payment of interest on lapsed instalments, and that the appellant in no way waived his claim to interest.

It appears to the Court that the question whether the plaintiff had waived his claim to demand interest was one of fact, and that the Judge has found that the plaintiff did waive his claim. Our attention has been drawn to a decision of this Court; but that case is not similar to the case before us, for in that case the party averred that he had paid the instalments of rent upon the precise dates upon which they fell due, and took issue on that point. In that case, the Judge did not find a waivor; whereas in this case, he does substantially find that the plaintiff may be considered to have waived his claim to interest. It is true that the kubooleuts stipulate for the payment of interest upon all sums not paid on a fixed date; but we find the landlord in this case accepted the sums due on account of principal on successive dates, from time to time, for a series of ten years,

without making any demand for interest, and without applying any of the sums paid during the above long period to the discharge of any interest which might be due. The interest in this case was reserved not as penalty, but as a sum due under a contract; and it is not disputed that a Hindoo, by Hindoo law, can give up or waive a portion of his claim verbally.

For these reasons, and as the Judge has found as a fact that the plaintiff did waive his claim to interest, we cannot interfere with his decision.

The special appeals are dismissed, with costs bearing interest at the rate of 12 per cent. per annum, from this date to date of realization.

The 3rd June 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

Jurisdiction—Regular Suit to enforce summary decree for rent.

Case No. 2328 of 1862.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Judge of Hooghly, dated the 11th June 1862, reversing a decision of Baboo Doorgapersaud Ghose, Additional Principal Sudder Ameen of that District, dated the 3rd May 1861.

Anund Moyee Dossee (Plaintiff) *Appellant,*

versus

Puttit Pabunnee Dossee and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Aushootosh Dhur* for Appellant.

Baboos Dwarkanauth Mitter, Unnodapersaud Banerjee, Khetternauth Bose, and *Kadur Nauth Chatterjee* for Respondents.

A regular suit cannot be maintained to enforce a decree in a summary suit for rent which the Revenue Court has found to be satisfied, and therefore refused to execute (Steer J. *dissentiente*).

The Chief Justice and Justices Norman, Kemp, and Seton-Karr.—This case has been referred to a Full Bench by a Division Court for the purpose of deciding whether this regular suit is maintainable. It appears that the plaintiff had purchased a zemindaree with all outstandings amongst which were two summary cases for rent against the defendant.

When the plaintiff sought to execute the decrees, the defendant set up an answer to the execution of the decree, that he had paid the amount of the decree, and acquittances were produced by him which the Collector held to be genuine. Finding that the decree had been satisfied, the Deputy Collector refused to execute, upon which the plaintiff appealed to the Collector, but without success. He then commenced a regular suit, and in his plaint prayed for execution of the summary decree according to the usual practice. We are not aware of any case in which it has been held that a suit can be maintained in a regular Court to enforce a decree of a Revenue Court which the Revenue Court has refused to execute upon the ground that it has been satisfied. We are not now called on to decide whether a summary decree would be a bar to the institution of a suit in a regular Court for the recovery of the rent decreed in the summary suit, because the plaintiff does not ask for a decree for the rent, but for execution of the summary decree.

The lower Court decreed the plaintiff's claim. In appeal, the Judge reversed the judgment of the lower Court.

The majority of this Court are of opinion that the case is governed by the decision of the Sudder Court of the 5th July 1859, which they think was founded on good sense and ought to be upheld. This appeal will, therefore, be dismissed with costs and interest.

Mr. Justice Steer.—I regret to be obliged to dissent from the Chief Justice and from my other learned Colleagues upon this question.

I take it, without looking to the too literal construction of the plaint, that the plain object of the suit of the plaintiff is to get from the Civil Court what he has failed to get from the Revenue Court.

If, in the investigation of a summary suit for rent, a Collector had refused to award any rent on the ground that the receipts filed showed no rent to be due, there is no question that a regular suit would lie to contest the Collector's award. By parity of reasoning, there should be a regular suit where a Collector, after decree passed, refuses to allow execution of the decree on the ground that subsequent payments have satisfied the decree. In either way (the refusal to give a decree, or the refusal to allow a decree to be executed), the party claiming the arrear is equally injured by the Collector's decision; and I hold that, by the general tenor of the Regulations referring to summary awards by the Collector, a remedy is given to parties aggrieved to institute a regular suit to set aside the summary award. This view seems to be consonant also with the general past practice of the Civil Courts; and on these grounds I consider that the Civil Court has the power to entertain a Civil Suit to declare the order of the Collector erroneous, and to give to the plaintiff in the suit what the Collector should have given him, provided of course that the action is based on true grounds.

The 1st July 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

Application to Collector under Section 25 Act X of 1859, not a Suit.—Appeal.

Case No. 7 of 1862.

Summary Appeal from an order passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 5th October 1861.

Mr. C. J. Phillip, *Petitioner*,

versus

Shibnath Moitro, *Opposite party*.

Baboos Lukhee Churn Bose and *Kallee Mohun Doss* for Petitioner.

Baboo Gopeenath Mookerjee for Opposite party.

An application to a Collector under Section 25 Act X of 1859 is not a suit. Consequently the appeal from an order made by the Collector on such an application lies to the Commissioner, and not to the Judge.

THE question raised in this case is, whether an order passed by a Collector, upon an application made under Section 25 Act X of 1859, is applicable to the Judge or to the Revenue Authorities. Section 151 of that Act enacts that " all orders passed by a Collector under this Act, not being judgments in suits and relating to the trial thereof, or orders passed after decree and relating to the execution thereof, shall be appealable to the Commissioner." It is therefore necessary to determine, whether an application under Section 25 is a suit or not. If not, then an order passed by the Collector upon an application made under Section 25 is not a judgment in a suit, or an order passed in the course of a suit and relating to the trial thereof, or an order passed after decree and relating to the execution thereof.

A Full Bench of this Court has held that an application to the Collector under Section 28 is a suit. But in that Section it is stated that the " application shall be dealt with as a suit under the provisions of this Act," and that " every such suit shall be instituted within the period of 12 years from the time when the title of the person claiming the right to assess the land or dispossess the grantee, or of some person claiming under him, first accrued, &c." Under those words the Court could not say that an application to the Collector under Section 28 was not a suit. Section 25 is differently worded. It enacts " that if any zemindar or other person in receipt of the rent of land requires assistance to eject any cultivator not having a right of occupancy, or to eject any farmer or other tenant holding only for a limited period after the determination of his lease or tenancy, or any agent after the determination of his agency, or to enforce any attachment or ejectment expressly authorized by any Regulation or Act, he shall make application to the Collector, and the Collector shall proceed thereupon to enquire into the case, and pass orders in the manner provided for suits under this Act."

Now the application which has been made to the Collector is an application made to him to give assistance ; and when that application is made, the Collector is to proceed thereupon to enquire into the case and pass orders in the *manner provided for suits* under the Act. The Collector may no doubt summon the parties to appear before him, and proceed *in the manner provided for suits* in order to determine whether he ought or not to render the assistance applied for. If the applicant cannot make out a clear case for his assistance, the Collector will not interfere. The application is not a suit, and consequently the appeal from the Collector's decision lies to the Commissioner, and not to the Judge. We think that the Judge ought not to have tried the appeal, and therefore reverse his decision with costs and interest. This is in accordance with two decisions reported at pages 32 and 285 of the Decisions of 1862.

Section 152 enacts that " every appeal against the order of a Collector shall be presented to the Commissioner within 30 days from the date of the order." We therefore cannot now grant to the respondent leave to present an appeal to the Commissioner after the time prescribed by that Section. But he has a remedy in a regular suit, either under the provisions of Section 23 Act X of 1859, or in the Civil Court as the case may be.

The 17th July 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. V. Bayley, G. Campbell, and Shumboonath Pundit, *Judges*

Sale in execution of decree (against representative of deceased person) —Effect of.

Case No. 1240 of 1861.

Special Appeal from a decision passed by Baboo Nobin Kishen Paulit, Principal Sudder Ameen of Chittagong, dated the 28th May 1861, *reversing a decision of Mr. Richard Finney, Sudder Ameen of that District, dated 18th December* 1860.

Buksh Ali Sowdagur (one of the Defendants) *Appellant*,

versus

Essan Chunder Mitter (Plaintiff) and others (Defendants) *Respondents*.

Mr. R. T. Allan, Baboos Kissen Succa Mookerjee and *Unoocool Chunder Mookerjee*, and *Moonshee Ameer Ally* for Appellant.

Baboos Luckhee Churn Bose, Kishen Kishore Ghose, and *Obhoy Churn Bose* for Respondents.

A suit was brought against A's widow upon a bond given by A. In execution of the decree obtained against the widow, A's property was put up and sold. The advertizement of sale in one place said that the property to be sold was the property of the widow ; and in another, the rights and interests of the debtor. HELD that the property intended to be sold, and sold, was the rights and interests, not of the widow personally, but of the widow as A's representative. (*Dissentiente* Campbell, J., who held that a public sale carried only the rights which were expressed, and not those which ought to have been expressed, in the proclamation of sale.)

Mr. Justice Campbell.—UNDER cover of a sale of the rights of Mussamut Shoobutra, mother of plaintiff, defendant got possession of Essan Chunder's estate. Plaintiff brought a suit to set

aside the sale, and the Principal Sudder Ameen set it aside on the ground that plaintiff was the real owner in possession, and could not be dispossessed by sale of Shoobutra's rights; the purchase-money he ordered to be refunded to the purchaser. It appears that a creditor of Shoobutra's husband formerly brought an action against her for a debt which he alleged to be due from her late husband; but as he alleged that the son was then a minor, and she in possession of the estate, he sued her. Decree was passed against the defendant without any specification of her representative character. But, in concurrence with my learned Colleague, I think that the context shows that the suit and decree were against Shoobutra as representative of Juggomohun, and that the decree can be executed against the estate of Juggomohun. But, if we thus think not fatal the omission to put in proper form the decree, at any rate it was necessary, as it seems to me, that, in proceeding to execution, the creditor should have claimed to proceed against the estate, and, in selling the property, made it clear that Juggomohun's rights were sold. He did not do this. On the contrary, in the sale advertisement, while there are distinctly stated as recorded owners Shoobutra and Essan Chunder, still, in the columns showing whose rights and interests are to be sold, the name of Shoobutra only appears. I do not see how it can be contended that the man, who under this irregular sale bought and paid for Shoobutra's interests only (which were *nil*), can take the rights of Essan Chunder. It is, I think, necessary to security and fair dealing that, when property is put up for public sale, it should be distinctly and precisely stated whose rights in what are sold. Who would give full value for a mere speculative chance of making out that somebody's rights advertized ought to have meant somebody else's rights not advertized which by litigation a speculative purchaser might acquire, and where would be the end to litigation under such a system? I hold that a public sale carries only the rights which are expressed in the proclamation of sale, not those which ought to have been expressed; and that a man who buys can in justice take only what is put up for sale. In this case, then, I think the order of the Principal Sudder Ameen both legal and equitable, and would uphold it. The creditor has still his remedy by going the right way about it to assert his claim against the estate of the original debtor in his son's hands. The pleader for the appellant has entirely failed to show me any case, in which an auction-sale of the rights of A actually put up was held to convey away the rights of B not put up, but which might or ought to have been put up.

Mr. Justice Bayley.—In this case the facts proved upon the record are these: One Juggomohun borrowed a certain sum of money: he failed to pay it when due; he died; and his widow was sued by that creditor as the wife of the deceased. His son Essan Chunder, the present plaintiff, was also a party to the suit. The creditor got a decree against "defendants respondents" in those words and in no other. It is contended that this is a *personal* decree against Shoobutra. Under the state of facts above put, I can in no way concur in this view. Shoobutra did not borrow the money; the failure to pay was not her's; and after her husband's death, his estate and not his wife personally was liable for the debt. A mere clerical defect of statement, as is given in inverted commas above, cannot convert what, the facts show, could never have been a personal decree into such a decree. But I think the same set of facts and others to be noticed are more important to be considered than the mere letter of a *lotbundee* as to the purchaser's rights. Now who is the plaintiff here? Essan Chunder the son of Juggomohun, the last being admittedly the person who borrowed the money. If this plaintiff then succeeds in his suit, he gets back his father's estate without that estate, which I clearly hold to have been originally liable for Juggomohun's debt, having paid its liabilities. Then what does the lotbundee say? That the rights and interests of the "*dank*" or debtor are the subject of sale: and that such debtor is Shoobutra. Now, if Shoobutra appears, as we both hold she does, only in a representative character in the suit, is a mere stroke of a mohurrir's pen in a lotbundee to change her status and position, and are the rights of the purchasers to be lost in consequence? If Shoobutra was, as is held, defendant in the suit merely in a representative character, the decree must have been against her in that character, and the sale notification and all other proceedings must denote her, at least by implication, in that character as debtor. The lotbundee does not by any means specify that she stands in any other character, for it does not use the term "*Jati*," *i. e.* personal or any other usual equivalent term which is common where personal liability is intended specifically to be indicated. The purchasers looking to all these facts, especially to Shoobutra's character in the suit, and then to the decree for Juggomohun's debt, would, I think, be warranted in considering that Juggomohun's rights and interests through his representative, the widow, were sold, Shoobutra being only recorded in the lot bundee as the representative of her husband in the suit. I would, therefore, reverse the decision of the Court below in favor of plaintiff, and decree the special appeal with costs. Let the papers go without delay before a third Judge.

The Chief Justice and Mr. Justice Shumboonauth Pundit.—A difference of opinion having existed between Mr. Justice Bayley and Mr. Justice Campbell, this case has been referred for the opinion of a third Judge. Section 23 of Act XXIII of 1861 provides that such cases may be re-argued before one or more other Judges; this case was accordingly ordered to be set down for hearing before this Bench.

The suit was brought by the plaintiff to recover property which, he stated, had descended to him from his father Juggomohun. The defendant defended the suit upon the ground that Ram Chunder Dey had sued Shoobutra the plaintiff's mother as widow of Juggomohun; that he had obtained a decree in that suit for the amount

of a bond which had been given to him by Juggomohun with interest amounting altogether to Rupees 4,802; and that the estate of Juggomohun was sold under that decree. The answer of the plaintiff to that defence is that, although the property was sold under that decree against the widow, the advertisement of sale merely declared that the rights and interests of the widow were to be sold. Now the question is, whether the widows' interest is *all* that was sold. The suit under which the sale took place was brought on the ground that Juggomohun had given a bond for Rupees 999, which amount he promised to pay at the end of the year; and that he died leaving Essan Chunder, the plaintiff, his minor son as his heir under the guardianship of his mother Shoobutra, the widow. The plaintiff in that suit failed against the mother in the first Court. Upon appeal, the Judge reversed the decree of the lower Court, and gave a decree against the mother for the amount sought to be recovered, and it was under that decree that the property was sold. The advertisement of sale referred to the number of the decree and stated, under the head of whose property was to be sold, that it was the property of the mother. In a further column it stated that the rights and interests of the debtor were the property to be sold. If the parties who went to that auction had referred to the decree, they would have found that the debt for which the sale was to take place was not the widow's but Juggomohun's, and that the property to be sold under the decree was not the widow's but Juggomohun's, because Juggomohun was really the debtor and the widow was sued merely in her representative character. Section 203 Act VIII of 1859 enacts that "if the decree be against a party as the representative of a deceased person, and such decree be for money to be paid out of the property of the deceased person, it may be executed by the attachment and sale of any such property, or, if no such property can be found and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, the decree may be executed against the defendant to the extent of the property not duly applied by him, in the same manner as if the decree had been against the defendant personally."

Now in the first place the execution is to be levied upon the property of the deceased. Well, then, by this decree stating that the widow's property was to be sold, it was clearly the same thing as if it had stated that the sale was to be for a debt of Juggomohun's which was recovered by the decree. But it is contended that the plaintiff did in fact purchase only the widow's rights and interests, and that he gave 8,000 Rupees for them. But what rights and interests had the widow to sell? It is true that, after her husband's death, her name was entered in the Collector's books. But her rights and interests were absolutely nothing; the property descended to the plaintiff. Therefore, it could not have been the intention of the purchaser to purchase the widow's rights and interests which were nothing, but the rights and interests of Juggomohun or of his heir and representative. It is not contended that there was any collusion between the widow and the plaintiff in the matter of the sale. If the property had been properly described at the time of sale as the property of Juggomohun or of Juggomohun's representative, and had been so purchased for 8,000 Rupees after deducting 4,802 Rupees the amount of the decree, the balance ought to have been applied for the benefit of the son. If the widow, as guardian of her son, has received and misapplied the money, she could have been sued and may now be sued for it. But it would be exceedingly hard to hold that, as the plaintiff purchased the widow's rights and interests, and as her rights and interests are *nil*, the plaintiff is entitled to nothing for his 8,000 Rupees. It is not probable that the purchaser would have paid 8,000 Rupees for the widow's rights and interests when they were worth nothing at all.

Supposing, in an ordinary case, a suit is brought against an executor, and judgment is given against him as an executor, the purchaser under an execution buys not the personal estate of the defendant, but the property of the defendant in his representative character, and for a debt which was due from him in that capacity.

Looking therefore to the advertisement of sale which referred to the decree, we think it was perfectly clear that it was intended to sell the rights and interests of Juggomohun's representatives, and that the defendant accordingly purchased that interest under the decree. Under these circumstances we think that the plaintiff is not entitled to recover this property, and that, in accordance with the opinion of the majority of the Judges of this Court by whom this appeal has been heard, the decree of the Principal Sudder Ameen must be reversed, and this appeal decreed with costs.

The 23rd July 1863.

Present:

The Hon'ble Shumboonauth Pundit, E. P. Levinge, and A. A. Roberts, C. B. *Judges.*

Hindoo Law—Adoption (of Grand-Nephew)—Succession (to adoptive Maternal Grand-Father's estate).

Case No. 1580 of 1862.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 7th May 1862, reversing a decree of Baboo Koylash Chunder Deb Roy Bahadoor, Acting Principal Sudder Ameen of that District, dated the 6th July 1861.

Morun Moee Debeah and others (Plaintiffs) *Appellants,*

versus

Bejoy Kishto Gossamee and others (Defendants) *Respondents.*

Baboos Dwarkanauth Mitter and *Sreenauth Doss* for Appellants.

Baboos Kalee Mohum Doss and *Onoocool Chunder Mookerjee* for Respondents.

The adoption of a grand-nephew is not repugnant to Hindoo Law. An adopted son cannot succeed to his adoptive maternal grand-father's estate when there are collateral male heirs.

The appellants, two of whom are nephews (brother's sons) of one Shib Shunkur deceased, sue, as nearest heirs, to recover the property of deceased, who died without leaving male issue.

Deceased had a daughter named Anud Poornee who was married to the respondent Bejoy Kishen. They had no children, but adopted the defendant Prosonnonauth Goshami who was the grand nephew (brother's grandson) of the respondent.

During her life Anud Poornee was in possession of her father's property; and at her death the respondent Bejoy Kishen retained possession of the property for their adopted son whom he seeks to constitute as legal heir of his father-in-law Shib Shunker, to the prejudice, as appellants say, of them the legal male heirs of Shib Shunker.

The issues tried in theLower Courts were; *1st.*—Whether the adoption of Prosonnonauth Goshami, who is grandson of respondents' brother, is valid according to Hindoo law.

2ndly.—Whether, even if legally adopted, Prosonnonauth can inherit the property of his adopting mother's father, there being collateral male heirs in the persons of plaintiffs.

3rdly.—Whether her father's brother's sons being alive, Anud Poornee could adopt to their prejudice.

The Court of first instance, in conformity to the vyvastha of the Pundit of the Moorshedabad Circle, which was concurred in by the Pundit of the Sudder Court, pronounced the adoption of Prosonnonauth to be invalid as he was a grand nephew, not a nephew; but found the other two points in favor of respondents' claim.

On appeal, the Judge of Rajshahye, with the help of the new Principal Sudder Ameen of the district and the Head Master of the Government School at Beauleah as Assessors, set aside the ruling of the first Court on the first issue, and held that the adoption of a grand nephew was lawful. On the other two issues the Appellate Court agreed with the Court of first instance that the adopted son could inherit the estate of his adoptive mother's father, and that the existence of collateral male heirs was no bar to the adoption.

A special appeal is brought before this Court.

It is obvious that the decision of the case depends upon the two first issues.

As regards the first point, the legality of the adoption of a grand nephew, we observe that the injunction in the Hindoo law is that a son should be adopted from among "Sapindas" or kinsmen extending to the seventh degree. A brother's son is indicated as the first Sapinda, and should, as a general rule, be selected for adoption in preference to all other individuals (Sutherland's (Synopsis, page 214. But the brother's grandson being one degree more distant, is by no means excluded as urged by appellant. It is contended that it would have been unlawful for respondent, the adopting father, to marry his nephew's wife, the mother of the adopted boy; and that, on the principle that it is not lawful to adopt one whom the adopter could not lawfully beget, respondent could not adopt his grand nephew. The commentators, however, in illustrating this principle, point out that a man must not adopt his sister's son or daughter's son. In such cases the operation of the principle is obvious enough. But there is no reason whatever why the respondent should not have lawfully married his nephew's wife, the mother of the adopted boy, previous to her marriage with the boy's father. This plea cannot avail the appellant, and we concur with the Judge and Assessors that the adoption by respondent of his grand nephew Prosonnonauth Goshami was not repugnant to Hindoo law.

Holding the adoption to be legal, it now remains for us to consider the second point, *viz.* the right of the adopted son to inherit property, through his adopting mother, from the father of the latter when there are collateral male heirs. Two cases have been referred to as illustrating this point of law.—*1st,* the case of Gungamoye, page 128, Vol. III of the Sudder Dewanny Reports, which is quoted by appellant in support of his claim; and, *2ndly*—The case of Gungapershaud Roy, page 1,091, Vol. 2 of Sudder Decisions for 1859 which is adduced by respondent. These are the only two cases which we have been able to find, which at all bear upon the disputed point; but the question now before us did not directly arise in either of these cases, and has never, so far as we can learn, been authoritatively decided. In the case of Gungamoye, which was decided in the year 1821, the vyvastha was to the effect that "a son adopted with the permission of her husband by a woman on whom her father's estate had devolved, will not be entitled to such estate on his adoptive mother's death, but such estate will go to her father's brother's son in default of nearer heirs. The reason why the adopted son would have no title to the estate to which the adoptive mother had succeeded, is represented to be, because, according to the Dayabhaga, an adopted son has no legal claim to the property of a Bandhu or cognate, and, according to the interpretation of the text of Menu, which admits adopted sons to the right of succession collaterally the meaning is succession to the property of persons belonging to the same family as the adoptive father, as fully appears from Manvastha Muktavall, compiled by Kulluka Bhatta and other authorities." This dictum was accepted, and a decree given in accordance hereto, by one of the Judges of the Court; but the remaining two Judges observed that the dictum referred to a contingency which had not happened in the case before them, and that it was not necessary to provide for a state of affairs, which might never take place. Nevertheless, the dictum of the Pundit on this occasion has been accepted by

Macnaghten and other writers on Hindoo law, as the principle which would govern the claim of an adopted son to succeed to the estate of his adoptive mother's father, which is the very case now before us.

But the Judges who tried the case of Gunga Pershad Roy in the year 1859, considered that the doctrine laid down in the case of Gungamoye, had not been conclusively adopted by the Court; and that it could not be said to have acquired all the authority of a recognized principle of Hindoo law to which the Sudder Court had intended to give effect. They, therefore, determined to ascertain from the Pundit of the Sudder Court "whether an "adoptive mother's relations succeeded an adopt- "ed son under the same circumstances that would "govern their succession to a natural born son." The following was the vyvastha received, and upon which the Court in 1859 acted :—"In the "event of a Datuk or an adopted son dying "without leaving any heirs of the adoptive fa- "ther or of the said adopted son, the heirs of the "father of the adoptive mother are, under the "Hindoo law, entitled to inherit the property of "the said adopted son by right of succession."

In support of this opinion the Pundit quotes three authorities, among which is a dictum of Jaguyavalkya Munee from the Dayabhaga to the effect that the Bandhu or descendants of the maternal grandfather succeed an adopted son on failure of nearer or agnate relations

These are the only two cases in any way bearing upon the question which have been brought to our notice, nor have we been able to find any others; and although these two cases at first sight appear to be conflicting, and it has been represented on the part of respondent that the ruling in the latter case, that of Gungapershad Roy, modifies the interpretation of the law which had been governed for the previous 38 years by the case of Gungamoye, we do not consider that it is so. All that the case of Gungapershad Roy proves is that the ancestors in the ascending line of the adoptive mother of an adoptive son may, as distant relations, inherit the property of the said adopted son when there are no nearer heirs, that is to say, that the adoptive mother's grandfather might succeed as the 29th in degree; the adoptive mother's father being, according to Hindoo law, the 28th in degree. The question now before us, *viz.* the right of an adoptive son to succeed to his adoptive mother's father's estate was not raised or alluded to. It is no doubt argued for respondent that there must be a reciprocal right, and that the adopted son should succeed his adoptive mother's father; but this we cannot admit unless it be in the relation of a Bandhu, and in default of nearer heirs, the adopted son standing in the same relation as a natural born son to his adoptive mother or her father is altogether opposed to the theory and principal of adoption in the Hindoo system. According to it a son of some sort is essential to the eternal happiness of a man, and in consideration of the performance of funeral obsequies, the adopted son succeeds to the estate of his adopting father. But a woman needs no such mediation. The law says, "a virtuous wife ascends to heaven though "she have no child, if, after the decease of "her lord, she devote herself to pious austerity." Menu 5-160.

The adopted son, whether adopted, as in this case, by husband and wife in concert, or by the husband alone, or by the widow with the permission of her deceased husband, is adopted for the benefit of the husband. The reason given by Macnaghten in his Chapter on Adoption, why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father is that the party so adopted "becomes the son of a person whose lineage is "distinct from that of the maternal grand- "father."

Considering that this was the opinion which prevailed from the year 1821 to the year 1859, and that the vyvastha given in the case of Gungapershad in the last-mentioned year does not directly over-rule the prevailing opinion; that not a text of law or a single precedent can be quoted to support the present claim; and, lastly, believing it to be opposed to the theory of the Hindoo system of adoption, we disallow the claim of Prosonnonauth Gosami to succeed to Shib Shunker's estate.

We decree the appeal, reverse the decision of the lower Court, and decree the appellant's claim with all costs.

Mr. Justice Shumboonauth Pundit.—I agree generally with my colleagues. I wish to add the following, with reference to the point for the determination of which the case is now taken up by three Judges.

No direct text of Hindoo law has been shown distinctly ruling that an adopted son of a daughter can (after the death of his adoptive mother) succeed to the estate of the father of the latter, though, by adoption, the deceased, undoubtedly, had legally become *his* maternal grandfather.

No case, either of Bengal or Behar, within the jurisdiction of any of the two Courts of this Presidency or of any other Presidency ruling the point, has been shown. Really such a claim was not likely to be found to be so rare, if there was any foundation for it. The very fact of no case being found, shows that the law on the point, as put down in all the English Compilations of Hindoo law (though not affirmed directly by any decision in a proper case), must have long been considered as settled, or else we would have found numerous cases in which the point, now under discussion, would have fairly been raised. It is asked by those who contend for the rights of the adopted grandsons by daughters, why should they lose a particular line of inheritance altogether? The answer is simply this, that, in other respects besides this, such an adopted son is admittedly in a worse position than a son of the body.

If, for instance, after the adoption of a son, a son of the body be born to the adopting father, the adopted son obtains less than he would have got if he also had been a son of the body, and is not

n many other respects treated as the eldest son of his adopting father.

The system of adoption is one full of injustice; and while the adopted himself becomes the cause of disappointment to others, he himself is not altogether exempt from the possibility of his rights of inheritance in one direction being curtailed entirely, just as well as, in being adopted, he might be a laser of his share of a valuable ancestral estate by his being given away by his natural father, perhaps a rich man, for adoption in a family comparatively indigent and poor.

If this right of an adopted son of a daughter had been ever recognized in Hindoo law, then its rules regarding the rights of the daughters to succeed their father would have been worded quite differently from the manner in which in all books they are expressed. Some allusion to an adopted son would necessarily have been made just where barrenness and childless widowhood are described as bars to their right of inheritance. Allusion would also have been made where such expressions as "capable of bearing children" are used. It is quite obvious that the present wording of the law on this subject is clearly inconsistent with the right of an adopted son of a daughter to succeed to the estate of her father Besides, if an adopted son lose a part of his rights by a son of the body being born to his adopting parents after his adoption, much more than an elder brother loses by the subsequent birth to his father of another son of the body, it is natural to suppose that the same difference which is observed between two such brothers with regard to the estate of their father, adoptive and natural respectively, would reasonably be maintained with regard to their rights of succession to the estate of the father of their mother. No such provision is made when the right of succession of daughter's sons is specified in all text books and English compilations of Hindoo law.

Notwithstanding the amendment made by the late Sudder Court upon the doctrine of Dyabhaga to the extent of admitting the right of an adopted son to succeed collaterally, according to the doctrines of Menu (as explained by his best commentators), in the family of his adopting father, it may still be an open question, whether, when two brothers, one an adopted son, and the other the son of the body of his father, have to inherit, as brother's sons or brother's grandsons, the property of a kindred of their father they take this estate in equal or in the same shares in which they had taken their father's estate. It is clear that the last-mentioned argument is not conclusive, if these brothers can, in the above case, succeed in equal shares; and in that case, the omission of such distinction would be useless in both cases. We do not find that we can dispose of this question by stating as a general principle that one may adopt another as his own heir and give him all his own property, but cannot be allowed through such an act to disinherit a *third* person from the estate of a *fourth* individual, because an adopting father may even now do so, when his adopted son may have a right to claim as a nearer kinsman the estate of a brother or cousin or uncle of his adopting father to the prejudice of another kindred, who is distant by one degree in descent and who might have succeeded to the same unopposed, if there had not been this adoption.

The principal grounds upon which we think that the opinion of the English Compilers of Hindoo law against the right of an adopted grandson to succeed to the estate of his maternal grandfather is correct, are the facts of no direct texts acknowledging such a right being any where traced, and the absence among the reported cases of any suit in which the question directly arose. For aught we know, the case that we are now deciding might have arisen from a wrong understanding of the effect of the decision of 1859 upon this point of Hindoo Law, which, however, it did not attempt to decide.

From that decision it may be argued that, if the maternal relatives of the adopting mother stand in the position of those relatives that they would be to the son of the body of the daughter of their family, and if they have a right to succeed to the estate of this adopted son just as to that of a son of the daughter, why should the adopted son himself be debarred from claiming a similar right of inheritance himself to the estate of *these maternal* relatives?

Such reciprocal rights are not, however, invariably any part of the Hindoo system of succession. A man never succeeds his own daughter; and a husband is not invariably, to all kinds of his wife's Streedhun property, her heir exclusively, or jointly with others; and though to some Streedhun of a step-mother a son may be heir, she can never claim any inheritance from such a son of her husband.

The 19th August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble W. Morgan and Shumboonath Pundit, *Judges*.

Additional evidence (Taking of, when required by Appellate Court).

Case No. 407 of 1862.

Regular Appeal from a decision of Moulvie Mahomed Nazir Khan Bahadoor, Principal Sudder Ameen of Mymensingh, dated the 10*th July* 1862.

Ramjoy Surmah Mozoomdar (Defendant) *Appellant*,

versus

Rajah Puran Kishen Singh (Plaintiff) and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboos Sreenauth Doss* and *Kishen Kishore Ghose* for Appellants.

Baboos Dwarkanauth Mitter, *Onoocool Chunder Mookerjee*, and *Unodapershad Banerjee* for Respondents.

When a lower Court disposes of a case upon the merits as proved by evidence not legally admissible against the defendants, and the Appellate Court considers it proper to allow the plaintiff to adduce further evidence, it may either take such further evidence itself or send the case back to the lower Court to take such evidence.

In this case the Principal Sudder Ameen has given a decree in favor of the plaintiff. The decree was founded upon facts and documents not proved otherwise than by the former decree, and statements contained in a printed report of a decision of the late Sudder Court. Such statements were not legal evidence against those defendants who were not parties to the former suit, nor was the printed report evidence against any of them. The question is whether we should reverse the decree of the Principal Sudder Ameen, and give a decree for the defendants upon the ground that the petitioner's case was not proved by legal evidence, or should allow the plaintiff to bring forward fresh evidence in support of his case. We think that the plaintiff in this case is not blamable for not having adduced better evidence in support of his case, because, no doubt, his vakeel in the Court below, as well as the Judge, considered that the decree and statements in the several cases which have been reported were good evidence in this case. We might, therefore, be doing great injustice to the plaintiff if we were to decide the issue of family usage against him, upon the ground of the insufficiency of evidence given in support of it.

By Section 351 of Act VIII of 1859, it is enacted that, if the lower Courts shall have disposed of a case upon any preliminary point so as to exclude any evidence of fact which shall appear to the Court essential to the rights of the parties, and the decree of the lower Court shall be reversed, the Appellate Court may remand the case with directions to the lower Court to investigate the merits and to pass a decree thereon. But, in this case, the lower Court did not dispose of the case upon a preliminary point, but upon the merits and upon the very point which we are called upon to decide; and therefore it does not fall under Section 351. Section 352 says that "it shall not be competent to the Appellate Court to remand a case for a second decision by the Lower Court, except as provided in the last preceding Section." Therefore we have no power to remand the case to the lower Court for a second decision. But we have the power under Section 355 to allow additional exhibits to be produced, and additional witnesses to be examined, in order to enable us to pronounce a proper judgment in the case: and by Section 356 we may either take such evidence ourselves or require the Principal Sudder Ameen to take it. We think that it would be very inconvenient to send for the witnesses, and to take the further evidence in this Court; and that the proper course for us to pursue is to send the case back to the Principal Sudder Ameen to take such evidence. By Section 355 it is enacted that, whenever additional evidence is admitted by an Appellate Court, the reasons for the admission shall be recorded on the proceedings of the Court; and by Section 357, that the Appellate Court shall define the point or points to which the evidence is to be confined, and shall record the same on its proceedings.

The Principal Sudder Ameen having found the first and second issues in favor of the plaintiff upon evidence which was not legally admissible against the defendants Barroda and Pronnoda and Junkishore and Nobo Kishore Lahooree; and this Court not being able to pronounce a satisfactory decree upon the merits without further evidence, and being willing to allow the plaintiff to adduce such further evidence as he may think necessary, it is therefore ordered that the plaintiff be at liberty to adduce such further evidence provided he give security to the satisfaction of the Principal Sudder Ameen for the restitution of the property taken in execution of the decree of the lower Court and for the due performance of the decree of this Court. If the plaintiff neglect to give such security within one month from this date, or within such further time as may be allowed on application to this Court, this appeal will be decreed with costs and interest, and the decree of the lower Court reversed. The evidence to be adduced is to be confined to the following points:—*1st.*—Whether, according to the usage of the family, the plaintiff, as the eldest son, is entitled to inherit on the death of his father. *2ndly.*—Whether, if any usage prevailed in the family, it was waived or abandoned on the death of the father. *3rdly.*—Whether there is anything contained in any grant or other document relating to the estate either before or after the accession of the British Government, such as a restriction against alienation or division of the estate, which would prevent the plaintiff from being bound by the acts or laches of the father. If further evidence be adduced by the plaintiff, the defendants are to be at liberty to adduce such further evidence as they may consider necessary. The evidence is to be taken by the Principal Sudder Ameen and returned to this Court. All exhibits intended to be used by either party are to be filed, within six weeks from the date of the arrival of this order, at the Court of the Principal Sudder Ameen, or within such further time as the Principal Sudder Ameen may allow for that purpose. As soon as the exhibits shall have been filed, an early day is to be fixed by the Principal Sudder Ameen for taking and recording the evidence. The Nuthee in this case to be returned to the Principal Sudder Ameen, and to be sent back to this Court with the evidence. Upon the return of the evidence, either party will be at liberty to apply to the Chief Justice to fix a day for hearing the case.

The 21st August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Jurisdiction (of Civil Court)—Ejectment of tenant after expiry of lease.

Case No. 2313 of 1862.

Special Appeal from a decision of Moulvie Syed Ahmed Bux, Principal Sudder Ameen of Dacca, dated the 19th June 1862, modifying a decision of the Moonsiff of that District.

Muddun Mohun Roy (Defendant) *Appellant,*

Gourmonee Goopto (Plaintiff) *Respondent.*

Baboos Mohendro Lall Shome and Sreenath Doss for Appellant.

Messrs. C. and G. Gregory for Respondent.

Section 25 Act X of 1859 does not preclude a zemindar or other person in receipt of the rent of land, from suing in the Civil Court for the ejectment of a tenant after the expiration of his lease, instead of applying to the Collector for assistance.

In this case the landlord sued in the regular Civil Court to eject a tenant after the expiration of an ijara. The defendant set up that the suit could not be brought in the Civil Court, but that the case fell within Section 25 Act X of 1859, and ought to have been brought before the Collector. It is not suggested by the tenant or by his vakeel that the case comes within Section 23 of that Act. But it is put simply as one falling under Section 25; and it is contended that, if a landlord wishes to eject a tenant upon the ground that his lease has expired, he must apply to the Collector for assistance under Section 25, and cannot sue in a Civil Court.

A Full Bench of this Court has already determined that an application to the Collector under Section 25 is not a suit, and that the order of the Collector in such a case is not one from which an appeal lies to the Civil Court; but that the application is a mere summary application to the Collector to give assistance under circumstances under which according to the old law, the landlord might have ejected the tenant without resort to the Courts of Judicature. There was nothing in the old law to prevent a landlord from going to the Civil Court for redress, instead of taking the law into his own hands. In like manner it is clear that Section 25 Act X of 1859 does not preclude the zemindar or other person from asserting his rights in the regular Civil Courts, instead of applying to the Collector for assistance. Section 23 Act X of 1859 takes away the right of suing in any other Court than that of the Collector for causes of action made cognizable by the Collector; but Section 25 contains no such provision. If it had been intended to take away the right of suing in the Civil Courts, the provisions of Section 25 might have been incorporated with Section 23. The other points have been determined by the Court, which has referred only this point for the opinion of a Full Bench; and this point having been determined by us against the appellant, the appeal is dismissed with costs and interest at 12 per cent.

The 25th August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Limitation (under Act X of 1859)—Construction of the words "time of passing of the Act."

Case No. 151 of 1863 under Act X of 1859.

Special Appeal from a decision of Mr. M. Beaufort, Judge of Purneah, dated the 6th December 1862, affirming a decree of the Collector of that District, dated the 12th September 1862.

Baboo Luchmeeput Singh (Plaintiff) *Appellant,*

versus

Mahomed Mooneer (Defendant) *Respondent.*

Messrs. R. T. Allan and *H. Stainforth* and *Baboo Bungseedhur Mitter* for Appellant.

None for Respondent.

The period of limitation, within which suit must be brought for rent due *at the time of the passing* of Act X of 1859, must be reckoned from 29th April 1859 (the date of the passing of the Act), and not from 1st August 1859 (the date on which the Act came into operation).

The question which has been referred for our opinion is, whether the period of limitation within which an action must be brought for rent due at the time of the passing of Act X of 1859, is to be reckoned from the 29th April 1859, the date of the passing of the Act, or from the 1st August 1859, the date on which the Act was declared to commence and have effect. The words of Section 32 are that, "for arrears of rent due at the passing of this Act, suit shall be brought within three years after the passing of the Act;" and nothing can be clearer, as far as the words go, than that the date of the passing of the Act is meant, and not the date at which it was to come into operation. In Section 1 the Legislature use the words "before the date of this Act coming into force," which shows that they clearly understood, and had before them, the difference between the date of the passing of the Act, and the date of its coming into force. We must suppose, therefore, in this case, that the Legislature meant what they said, and we consequently hold that the period from which limitation is to reckon is the 29th April 1859, the date on which the Act received the assent of the Governor-General.

The 26th August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Limitation—Suit for value of personal property carried away and appropriated.

A suit to recover personal property carried away and appropriated to the use of the defendant, or the value of

such property, is not a suit for damages for injury to personal property within the meaning of Clause 2 Section 1 Act XIV of 1859, but is governed by the limitation prescribed by Clause 16.

Reference from Mr. O. Temple, Judge in charge of the Meherpore Small Cause Court, on the 14th *July* 1863.

The tenant in this case complained against the defendant for having entered his land, cut his growing crop of indigo plant, carried that crop away, and converted and appropriated it to their own use. The question is, whether that is a suit for damages for injury to personal property within the meaning of Clause 2, Section 1, Act XIV of 1859. We think that it is not; and that the suits for injury to personal property contemplated by that Clause are suits for damages for injury done to personal property, and not to suits to recover personal property which has been carried away and appropriated to the use of the defendant, or the value of such property. This is not a suit for damages for mere injury done to personal property, but for the value of personal property carried away and appropriated.

We think therefore, that the period of limitation applicable to this suit is six years as mentioned in Clause 16, the suit being one for which no other limitation is expressly provided by the Act. Under these circumstances we are of opinion, that the plaintiff is not barred by the Statute of Limitation, and that he is entitled to recover damages.

The 26th August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E Jackson, *Judges.*

Small Cause Courts (Jurisdiction of)—Incidental questions of title.

Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them.

The following case was submitted to the High Court by Mr. N. H. Thompson, Judge of the Principal Court of Small Causes of Kishnaghur, on the 24th April 1862, *under Section* 13 *Act XLII of* 1860.

In the case marginally noted, plaintiffs sue defendants for Rupees 32, being the estimated value of four mangoe trees which the defendants cut down and removed from the plaintiff's land.

Suit No. 699, Roghooram Biswas, Mongla Dassee, mother and natural guardian of Huree Narain Biswas, minor son, heir and legal representative of Becharam Biswas, deceased and Khema Dassee, widow of Kenaram Biswas, deceased, of Shooburnobehar.
versus
Ramchunder Dooby of Shooburnobehar, and Rungo Lall Nicary of Chandsharuck.

At the hearing of the case, the defendant Ramchunder pleaded that the land on which the trees grew had been held for many years by his father under a mourosee pottah given by plaintiff's ancestor; that, subsequently, the lands having been resumed, he, Ramchunder, had obtained a new mourosee pottah at an increased rent from the plaintiffs; and that the trees having been planted by his father, he, Ramchunder, was entitled under his pottah to cut them down.

On the part of the plaintiffs, it was admitted that, if the pottah filed by Ramchunder were a genuine pottah, it would give him the right to cut down the trees, but they deny that it is genuine.

The defendant thereupon pleads that the question, as to the genuineness of the pottah thus raised, is a question which it is not competent for this Court to consider.

If the suit were brought directly to set aside the defendant's pottah, it would not be cognizable in a Small Cause Court. But the case seems to me to be different where the question incidentally arises in a suit which was properly instituted in such a Court, and when the claim, which it is the immediate object of the action to enforce, cannot be decided until the incidental question be disposed of.

By Section 3 of Act XLII of 1860 (the Mofussil Small Cause Court Act) it is provided "that the suits cognizable by Courts of Small Causes shall be the following, namely, claims for money due whether on bond or other contract or for rent, or personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in value the sum of 500 Rupees." By Section 1 of the same Act, it is provided "that no Judge of any Court constituted under this Act shall exercise any Civil Jurisdiction except under the provisions of this Act."

Th point upon which the opinion of the High Court is solicited is, whether, in considering the genuineness of the pottah filed by the defendant Ramchunder, this Court would exercise a jurisdiction within the provisions of the Act under which it is constituted.

The present suit may be considered as one for damages, estimated at 32 Rupees. As a suit for damages for that amount, it is properly brought in this Court. But as it is impossible to pronounce whether the plaintiff is entitled to damages or not, until it be settled whether the pottah filed be genuine, I am of opinion that it is competent for me to consider that question; and that an objection to the genuineness of the pottah being raised is not sufficient to take the decision of the case out of my hands.

But I am anxious to obtain the opinion of the High Court upon the point, as it is one that seems to me to lead to very important consequences; for, if the view which I entertain be correct, a plaintiff bringing a claim for an inconsiderable sum alleged to be due on account of rent or as damages or the like, will be enabled to obtain a judgment upon a question of title which would not, in the ordinary course, fall within the cognizance of the Court, and which may involve much larger pecuniary interests than are apparent on the surface of the claim.

Opinion of the High Court.

We think it clear in this case that the Judge of the Small Cause Court had jurisdiction to try this question. Although the question of title to the mourosce pottah arose incidentally, the Judge had power to try the question as to the amount of damages. His judgment will not be conclusive except so far as regards the right to the damages claimed in the suit.

By the English Small Cause Court Act, express provision is made that Small Cause Courts shall not try a case in which the title to the freehold comes into question, unless by agreement of the parties. But there is no such provision in the Indian Act. We think, therefore, that the Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them.

The 29th August 1863.

Present:

The Hon'ble Sir Barnes Peacock Kt., *Chief Justice* and the Hon'ble L. S. Jackson, E. P. Levinge, Shumboonauth Pundit, and E. Jackson, *Judges.*

Limitation (Act XIII of 1848)—When Applicable.

Case No. 2067 of 1861.

Special Appeal from a decision passed by Mr. R. H. Russell, Judge of Backergunge, dated the 24th September 1861, *reversing a decree of Baboo Sreennauth Biddabagish Pundit, Principal Sudder Ameen of that District, dated the 25th May* 1860.

Komul Kishen Surkhul and others (Plaintiffs) *Appellants,*

versus

Bissonauth Chuckerbutty and others (Defendants) *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Dwarkanauth Mitter*, Vakeels for Appellants.

Baboos KalleeMohun Doss and *Hemchunder Banerjee*, Vakeels for Respondents.

Act XIII of 1848 applies only to suits for contesting the justice of an award as between the contending parties, and not to suits for the purpose of amending a settlement and establishing the rights of persons who were not parties contesting between themselves before the Collector.

This case was referred to a Full Bench with the following orders.

Mr. Justice Bayley.—In this case, the Lower Appellate Court has held that the special law of limitation (Act XIII of 1848) bars the plaintiff's suit, and has dismissed it accordingly. That Court has clearly held that there was a judicial award after adjudication of the right to settlement, under Regulation VII of 1822, between the contending parties. The plaintiff appeals specially upon the ground that there has been no such judicial award as was contemplated by Act XIII of 1848, admitting at the same time that, if this Court finds that there has been such an award, plaintiff's suit is barred under the law cited. The facts admitted, or sufficiently found as facts, to be beyond question in special appeal, are these. One Boirub and others, and one Doyamonee, as mother and guardian of a minor son, applied, as one party acting together, for a settlement under Regulation VII of 1822 to be made with them. Another party opposed them, named Ramjeebun. The claim of this latter Ramjeebun was rejected after investigation and adjudication, and the settlement was made with Doyamonee and Boirub. Upon this, Doyamonee subsequently petitioned, stating that Boirub and others had used her name without her authority; that Boirub and others had no right to the settlement; that she alone had such right; that, under cover of her name, Boirub and others had improperly acquired the settlement, in conjunction with her; and she, therefore, sued to have the settlement so made with him set aside: but having instituted such suit more than three years after the date of the order of settlement with Boirub and others, the Lower Appellate Court has, as above observed, held her suit as barred under Act XIII of 1848, which only allows a period of three years for a suit to be brought to set aside an award of survey or settlement authorities.

Now, the real and sole question for us to decide is, whether this is an award contemplated by Act XIII of 1848 or not?

The special appellant contends that it is not such an award, inasmuch as the Act in such a case as this would contemplate a contention between Boirub and others, and Doyamonee, as the one party who were successful in getting the settlement against Ramjeebun as the other party who was unsuccessful in that object; that even if the settlement of Doyamonee were acquired by any collusive act of Boirub and others, still there was no contention between Doyamonee against Boirub *then*, as before the settlement authorities, but the settlement was made not after adjudication of a contention between them, one against the other, but *with* them as one party whose rights to settlement were contested by Ramjeebun as the other party.

On the other hand it is argued by special respondent that the settlement authorities had a contention before them, and having adjudicated after contention who should have the settlement, made such an award as is contemplated by Act XIII of 1848.

After a careful consideration, I am of opinion that, as between Doyamonee and Boirub and others who acted as the one party against Ramjeebun who acted as the other, there was a contention, adjudication, and award by the Revenue authorities; but as between Doyamonee and Boirub and others acting as one party (whether fraudulently or not was not the question adjudicated then) there was no contention or award as to the settlement. The right of settlement was awarded on that occasion to Boirub and others and Doyamonee, and refused to Ramjeebun who alone

then claimed it against them. That was the contention and award; and the only one then. Thus, I hold there was no such award as will bar this suit, and I would decree the appeal, and reversing the order below, remand the case for re-trial on its merits.

Mr. Justice Roberts.—I do not think that Act XIII of 1848 admits of any such distinction as that for which appellants contend. I agree with the Court below, that the order of the Settlement Officers of 25th November 1847, rejecting the application of Ramjeebun, and admitting Doyamonee the mother of plaintiffs in this suit, and the present defendants to settlement, was a judicial award within the meaning of Act XIII of 1848. The mother of plaintiff was a party to that suit, and the plaintiff himself had cognizance of it. It is not, therefore, now open to plaintiff to contest the award then made. The plaintiff's interests were represented before the Settlement Officers, and he or his mother or guardian was a party to the suit. I would make no relaxation of the law on the ground that there was no contention between plaintiff's mother and the defendants. It is sufficient that she was a party to a judicial award. I would, therefore, uphold the decision of the Lower Court, and think that, as I differ from my colleague and the matter is an important one, it should be referred to a Full Bench.

Opinion of the Full Bench.

The contest before the Collector was not between Boirub and Doyamonee and the infants, on whose behalf the present suit is brought, but between Boirub and Doyamonee on the one part, and Ramjeebun on the other. The award was made between the two contesting parties, and no award was made between Boirub and Doyamonee and the infants. This is not a case to which Act XIII of 1848 applies. That Act applies only to suits for contesting the justice of an award as between the contending parties, and not to suits for the purpose of amending a settlement and establishing the rights of persons who were not parties contesting between them before the Collector. The real contest before the Collector was, whether the mehal to be settled appertained to an estate alleged to belong to Doyamonee and Boirub, or to an estate alleged to belong to Ramjeebun. The decision having been given in favor of the former estate, the present suit was brought upon the ground that the estate did not belong to Doyamonee and Boirub jointly, but to Doyamonee alone by descent from her father, and that the infants were heirs in reversion. It is contended that, Doyamonee having committed waste, the infants are entitled to immediate possession. Whether the suit can be maintained or not upon the merits, is not the question before us. The only question which we have to decide is, whether it is barred by Act XIII of 1848, and we hold that it is not so barred.

The 20th August 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Alluvial Lands.

Case No. 1169 of 1861.

Special Appeal from a decision passed by Major E. A. Rowlatt, Officiating Judicial Commissioner of Assam, &c., dated the 17th April 1861, affirming a decision passed by Chowdhry Cazee Gholam Huqunee, Principal Sudder Ameen of Gowalparah, dated the 26th April 1858.

Kirtee Narain Chowdhry (Defendant) *Appellant,*

versus

Protap Chunder Buroo̤ah (Plaintiff) *Respondent.*

Mr. H. Stainforth and *Baboo Gopal Lall Mitter* for Appellant.

Mr. R. T. Allan and *Baboo Dwarkanauth Mitter* for Respondent.

Quære.—To whom lands diluviated and afterwards reformed, belong.

This case was referred to a Full Bench with the following orders.

Mr. Justice Campbell.—This is a special appeal from the Deputy Commissioner of Assam, who decreed certain alluvial lands to plaintiff in reversal of decisions passed by the Deputy Collector and Commissioner of Revenue in 1852. It is admitted that the ancient boundary between the Pergunnahs, held respectively by plaintiff and defendant, is the Sankass River, and the Revenue Authorities maintained the stream of that river as the boundary in 1852. In the present case, the Deputy Commissioner finds that, before 1852, the river had encroached on plaintiff's lands, part of which were cut away in 1838 and 1839, so that plaintiff was obliged to pull down and remove his house to a greater distance. He then goes on to say—

"As the Deputy Collector laid down the boundary of plaintiff's land along the course of the river as it stood after it had encroached, it is quite clear that, if this boundary is maintained, the plaintiff loses land equal to the quantity cut away. The question, therefore, as to whether the boundary as laid down by the Deputy Collector is correct or not, must be determined in the negative." I need hardly say that this assumption by which the Deputy Commissioner begs the question in dispute is wholly contrary to law.

He next goes on to ascertain what was the course of the Saukass before the "*abrasion*" of plaintiff's lands commenced, and having ascertained traces of an old channel, he awarded to plaintiff all the land between the present and the old course of the river, although on the opposite side of the present stream and detached by it from plaintiff's estate.

It appears to me that this decision is insufficient and illegal.

It is not to be gathered from the pleadings that there was any sudden change of the stream from one channel to the other, leaving plaintiff's lands standing, and capable of identification. On the contrary, it appears from the Deputy Commissioner's finding that plaintiff's lands were "cut away"; and from the way in which the Deputy Commissioner speaks of the process of "*abrasion*" of plaintiff's lands, it may be assumed that in fact the river gradually abraded and washed away plaintiff's lands, and that a new chur was gradually formed on the other side of the river.

I cannot find that it is anywhere pretended that the existing soil of the disputed land as used by man can in any way be identified as that which was washed away from plaintiff's land. If plaintiff's land was actually washed and melted into the stream, it cannot be so. It is only found that, speaking geographically, the site on which the disputed lands have been formed was at one time or other (it does not appear how long ago) on plaintiff's side of the river, and must then (the river being the boundary) have belonged to plaintiff's estate.

Mr Justice Bayley thinks that the mere finding that, geographically or topographically, the site of the land in dispute was formerly within the limits of plaintiff's estate, brings the case within the precedent of the case of Ramanath Thakoor *versus* Chundernarain Chowdry, decided on 11th April 1862, and enables the plaintiff to follow it across the river and claim the newly formed lands.

I can hardly think that the decision quoted was meant to bear so broad a construction; perhaps in its fullest sense it was more particularly intended to apply to the case suggested, where A's estate lying between the river and B on the *same* side of the stream. A's estate is washed away, and afterwards reformed on the same side. I can hardly think all that is said in the decision quoted to apply to estates on different sides of the river (to which only I now apply myself); but there is much in its wording which might seem to do so, and if so, I must entirely dissent from that ruling as being in my view opposed to the law.

It appears to me that Regulation XI of 1825 (expressly enacted to declare the law on this subject) is quite clear that all land gained on either side of the stream by gradual accession is an increment to the estate on the side to which it is thus annexed. That Regulation is, as its preamble states, founded entirely on the old law and practice of the country; and a very long course of decisions, both before and after the Regulation, had, I imagined, made quite clear the principle that land abraded and washed away by a stream is lost to him whose estate is abraded, and that land gradually thrown out of the stream on the other side, is gained to him to whose estate it is adjoined. The cases are so numerous that I need not quote them. The principle has seldom been seriously disputed; it is so well established, that I may say that it has been recognised and acted on in thousands of cases, and is most thoroughly well known to every officer who has been employed in Judicial or Revenue proceedings in any part of the country. It is one of the first principles which a young officer learns. Many decisions to this effect are to be found in all the books, and, so far as I can discover, not one of an opposite tendency till that of 1862.

In one of the early cases (Raja Grischund *versus* Maharajah Tejchund, decided May 8th, 1809) in a note appended to the decision, Mr. J. H. Harington thus lays down the general law on the subject.

"In India as well as in Europe, what is gained by gradual accession is the property of him to whose estate the recess of the river or sea has annexed it. What is lost by the gradual encroachment of a river or the sea is a loss without reparation to the owner whose estate is thus destroyed."

That statement seems to be quite correct. The Code Napoleon, following the Civil Law, is very clear and express on the subject, *see* Articles 556, 557. 556. "*L'alluvion profite au propriétaire riverain.*" * * * 557. "*Il en est de même des relais que forme l'eau courante qui se retire insensiblement de l'une de ses rives en se portant sur l'autre. Le propriétaire de la rive découverte profite de l'alluvion, sans que le riverain du côté opposé y puisse venir réclamer le terrain qu'il a perdu.*"

"The proprietor of the bank discovered has the benefit of the alluvion, and the opposite proprietor cannot come to reclaim the land which he has lost."

That seems to be the rule common to this country and to all those governed by the old Civil Law. Now that we have surveys and means of identifying the geographical sites of lost estates, there may be much equity in favor of the claim of the old proprietors; but the law being express, we cannot alter it. It is, as it appears to me, for the Legislature, not for the Courts, to make so enormous a change of the Law as would be the result of my colleague's ruling. I would only further add some words with reference to the identification of the land separated by a sudden change in the course of the stream. I think that, so long as the whole of the useful soil is not actually washed away by the stream, so long as the deep stream has not passed over the site in the manner that we every day see, if, notwithstanding a partial submergence and washing away of the very surface soil, there still remains available for cultivation and use the original soil or part of it, then the original proprietors may resume possession of it. Notwithstanding a flooding and temporary submergence, it may be identified by stems of trees, remains of buildings, and other surface-marks, showing that the original soil still remains. But when the whole of the soil used by man for cultivation has been washed away, and new soil is afterwards re-formed on the same site, then the new land belongs to the proprietor on that side of the river on which the new soil is thrown up, and cannot be claimed by the proprietor on the other side who lost his old land by the abrasion of the river. When the whole of the useful upper

soil is gone, the mere fact that the site is geographically the same, and that the sub-soil in the bowels of the earth may still be the same, will not enable him to follow and re-claim the new land.

The case of a coal mine under the soil is suggested. But as in the alluvial lands in which these changes occur there are no minerals, the question whether mines still remaining in site can be identified and re-claimed is not likely to arise.

Even, if the law were, as the Deputy Commissioner supposes, I think that he would be wrong. For he gives plaintiff the whole of the land up to the extreme point to which the former course of the stream can be traced without giving any date of the former possession. Now it is notorious that these streams in the course of time oscillate gradually backwards and forwards from one side to the other of wide alluvial valleys. There is hardly an alluvial bottom in which such changes cannot be traced. By the application of such a rule, it may almost be said that three-fourths of the soil of Bengal would change hands, and all such cases would be decided against the party in possession. For the man, whose lands have been encroached on by the last bend of the stream, would cross it and take on the other side up to the farthest old channel in that direction, although that farther channel may formerly have been reached by cutting away the lands of the opposite party, and in the course of ages the intermediate sight may have belonged quite as often to one side as to the other. The Deputy Commissioner assumes the stream to be the boundary to establish plaintiff's claim to all the land up to the old course, but ignores the stream as now affecting the boundary.

I think that the case should be remanded to the lower Court to ascertain whether the lands claimed by plaintiff (being on the opposite side of the river from his estate) were gradually by diluvion and alluvion accreted to defendant's estate, or whether they were separated from plaintiff's estate by a sudden change in the course of the river without being destroyed and rendered for the time incapable of recognition.

In the former case they will, under Clause 1 Section 4 Regulation XI of 1825, belong to the defendant; in the latter case they will belong to the plaintiff under Clause 11.

As I differ from my colleague, the case must go before another Bench or Judge; and seeing that the case of Ramanath Thakoor has already unsettled the law as previously understood, and that the question is of vast importance, it might be well that it should be finally settled by a sitting of the whole Court.

Mr. Justice Bayley.—I think this case is one which is governed by the decision in Ramanath Thakoor's case, page 284, Hay's Reports for September 1862. I hold that the Deputy Commissioner has found as a fact the identity of the old channel of the Sankass; also that the Sankass was the boundary between the plaintiffs and defendant's estates, and that the lands diluviated from plaintiff's estate and have re-formed topographically within the original boundaries of the plaintiff's estate. I am of opinion that, upon these facts, the precedent cited applies to this case and should govern it.

I would only add that the basis of this opinion is that the lands are found as a fact to be lands diluviated from plaintiff's estate and re-formed within the topographical boundaries of that estate; that, therefore, neither under Regulation XI of 1825, nor by equity and good conscience, can they be given to defendants, but must be still considered plaintiff's lands.

Decision of the Full Bench.

This case is one in which the question as to what is the proper construction of Regulation XI of 1825, does not arise. It is a mere boundary question between the two parties. The Principal Sudder Ameen having gone to the spot, decided that question in favor of the plaintiff, and the Judge upon appeal has upheld his decision.

It is contended that the Principal Sudder Ameen referred to some evidence to which he ought not to have referred. But there was no appeal to the Judge on that ground. If there had been, he would probably have set the matter right, if necessary.

We think that there is no ground for special appeal in this case, and that the appeal must, therefore, be dismissed with costs and interest at 12 per cent.

The 2nd September 1863.*

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble Sumbhoonath Pundit, *Judges.*

Enhancement—Valuation of produce—Wages of ryot—Allowance for house—Risk on cultivation—Interest—Rent—Ryots with right of occupancy—Suits for rent or Kubooleut (Fixing of term.)

Case No. 972 of 1863 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. Jackson, Additional Judge of Nuddea, dated the 26th January 1863, modifying a decree of Moulvie Etazad Hossein Khan Bahadoor, Deputy Collector of that District, dated the 21st December 1861.

James Hills (Plaintiff) *Appellant*,

versus

Ishore Ghose (Defendant) *Respondent.*

Mr. Doyne, Mr. Woodroff, and *Mr. Mirfield* for Appellant.

Mr. R. E. Twidale for Respondent.

The produce of a beegah of *Dhan* in 1267 and 1268 should not be valued at the prices of 1269.

Whether a ryot borrows his food or not, he cannot receive his wages out of the proceeds of crops before the crops are gathered.

An allowance for a house cannot be made to a ryot in addition to a fair allowance for wages.

This case is included in the present No. as connected with Special Appeal No. 1607 of 1862 printed *ante*, p. 48.

Loss on account of crops destroyed or injured cannot be taken into consideration twice over—(1st) in ascertaining the average of the quantities and prices, and (2ndly) in making an allowance for risks based upon injuries done to the crops of which the quantities and prices must have been taken into consideration in calculating the average.

A landlord cannot be charged with a rate of interest or profit on capital far beyond the ordinary rate of interest or profit, and also with an allowance for insuring the return of the capital with such extraordinary rate of interest.

One rate of rent cannot be fixed for a ryot who expends his own capital, and another for a ryot who is compelled to borrow it.

The rate of rent which the landlord has a right by law to demand, does not depend upon the size of the holding or the circumstances of the ryot. What is a fair and equitable rent for one ryot for lands of a similar description and with similar advantages in the same neighbourhood, must also be fair and equitable for another, so far as the landlord is concerned.

A ryot who, but for the Permanent Settlement, would have been entitled to no more than half of the gross proceeds of his land, is not over-assessed when he is allowed to retain at least 5 6ths of the gross proceeds for his labor and profits on capital, and called upon to pay something less than the other 1-6th as rent to the Zemindar.

A ryot having a mere right of occupancy, and not a right to hold at a fixed rate of rent, has not such an interest in the land as gives him a right to a share of the rent. He has simply a right to occupy the land in preference to any other tenant, so long as he pays a fair and equitable rent.

A Judge cannot fix the term in suits by a landlord for rent or for kubooleuts, as can be done in a suit by a ryot having a right of occupancy for the delivery of a pottah.

The plaintiff seeks to recover rent at an enhanced rate for twenty-one beegahs, two cottahs, of land for the year 1268.

The ground upon which enhancement is claimed, is that the value of the produce has increased independently of the agency or the expense of the ryot. The rent formerly paid was at the rate of five annas four pie per beegah. Upon the first trial of the case in appeal before the Additional Judge of Nuddea, he found that the value of the produce of the *matan* lands had doubled, and that the plaintiff was entitled to double the former rental. The Judge consequently fixed the amount of rent at ten annas eight pie per beegah.

The decree came before the High Court upon special appeal, and we held that the rent was not necessarily to be increased in the same proportion as that in which the value of the produce had increased, and in that proportion only; but that it ought to be enhanced to a fair and equitable rate, not exceeding one rupee per beegah, the amount claimed by the plaintiff, and not exceeding the amount of the old rent with the whole or such portion of the increase added to it as would render it fair and equitable.

The Judge has now fixed the rate of nine annas a beegah. He has found that, on a cultivation of sixteen beegahs, the average gross proceeds amount to 148 rupees, and the outgoings to 135 rupees. The difference, amounting to 13 rupees, he takes as the rent of twenty-three beegahs to allow for fallow and the inequality of the two distinct descriptions of crops which are obtained from the lands. This gives the nine annas a beegah, the amount fixed. It appears from the judgment now under consideration, that, on the records being received back, it was proposed to remand the case to the Deputy Collector (who was then engaged in trying suits of enhancement connected with the appellant's villages) in order that he might take any additional evidence which either party wished to have recorded. The plaintiff, Mr. Hills, however, strongly objected to that course as being conducive of delay. Both parties finally agreed that they would rely upon the evidence already recorded by Mr. Collector Grey in a suit of the same description, in which the plaintiff sought to enhance the rent of the ryot of a neighbouring village. The Court agreed to this proposal, the more so as it was necessary that this and the analogous cases should be decided with as little delay as possible, and as the taking down, a second time, of all the evidence, which was very voluminous, would be a simple waste of time, it having already taken two months to record that given before Mr. Grey. At the same time, both parties wished to examine one or two witnesses on certain points which they considered material; and their statements were recorded.

The following issues were then fixed for decision:—

"1.—Whether the value of produce had increased, and if so, to what extent, and under what circumstances; and whether there was reasonable ground for concluding that such increase would be permanent?"

"2.—Whether, looking to the costs of production, and all outgoings connected with the produce, the plaintiff's demand of one rupee per beegah was fair and equitable; and if not, what was a fair and equitable rate of rent for defendant's *matan* lands?"

As to the first issue, the learned Judge says—"I have already recorded my opinion that the value of produce has increased, and it remains to consider whether such increase has been permanent up to this time, and whether it may be expected to continue in future years. There are two distinct descriptions of crops obtained from the lands in defendant's village. *First*,—the single *dhan* crops; *secondly*,—the double *dhan* and cold-weather crops. As regards the single *dhan* crops, the additional evidence now recorded has proved that the increase in value which the Court formerly held to have taken place, has not been permanent to the extent which was then considered to be proved. I held that the average produce of a beegah of *dhan* was eighteen *arrees*; that its former price was six *arrees* to the rupee, whereas its present price was three *arrees* to the rupee; that, whereas formerly a beegah of *dhan* gave the ryot three rupees, it now gave him six rupees. These calculations were made on the crops of the years 1267 and 1268. It now appears that both these crops were under the average. In 1269 there has been a very full and large crop, and the present price of *dhan* is between four and five *arrees* the rupee. The increase, then, on the *dhan* crop cannot be

considered more than one rupee four annas. To the permanency of this rise in the value of *dhan*, I see no reason to entertain any doubt. It has lasted now for more than five years, as admitted even by the defendant's witnesses; and in this year, where there is a very fine crop, it still exists. The price has, during these five years, increased to four *arrees*, three *arrees*, and two and a half *arrees* the rupee. The rise to three *arrees* and two and a half *arrees* the rupee undoubtedly arose from special disturbing causes, but there is nothing exceptional in the circumstances of the present year. If anything, it is an exceptionally good year, in which it might have been expected that prices would fall to the lowest point."

It has been objected, on the part of the plaintiff, in the seventh ground of objection, that the Judge, in calculating the average yearly value of a crop of 16 beegahs, has failed in this; that while he has taken the comparatively lower selling value of the rice during a year which yielded a full and large crop, he has not taken into consideration the increased quantity of rice which the ryot has to dispose of in such a year, which counterbalances the fall in price. It is not very clear whether, when the Judge says—" It now appears that both these crops (*i. e.* the crops of 1267 and 1268) were under the average, and that in 1269 there has been a very full and large crop,"—he meant that the produce of a beegah of *dhan* exceeded in quantity that which he had formerly found to be the average produce, or that the crop of the whole district in 1269 was very full and large in consequence of a large quantity of land having been cultivated. If the former was his meaning, he ought not to have valued the produce of a beegah in 1267 and 1268 at the prices of 1269; for he should have borne in mind that, if the prices were lower in 1269 in consequence of an increase in the produce per beegah, the larger crop of a beegah selling at the lower price might probably have fetched as much as the smaller crop of 1268 at the higher price; the increase in quantity making up for the decrease in price. But if the Judge meant that the quantity of produce per beegah remained the same, whereas the price had decreased in consequence of the cultivation of a larger quantity of land, his conclusion might be correct, and the objection of the plaintiff would not necessarily apply. If the case turned upon this point, we should have been forced, however reluctantly, to remand it again for the purpose of removing the uncertainty; for the premises do not warrant the conclusion which the Judge has drawn from them, *viz.* that the increase in value on the *dhan* crop cannot be considered more than one rupee four annas per beegah.

As to the cold-weather crops, the Judge says—" There is a distinct admission, even on the part of the witnesses for the ryots, that there has been an increase in their value. The plaintiff's witnesses state that the extent of the increase is higher than what the defendant's witnesses would make it. The former put it on an average about 3 rupees the beegah; the latter would put it about 2 rupees the beegah. I think it right to take the lower sum, and thereby to allow for a fall in the market rate."

Having arrived at the conclusion that there had been an increase in value of one rupee four annas per beegah on the *dhan* crop, and of 2 rupees on the cold-weather crops, and that the increase had not been brought about by the expenditure or agency of the ryot, the Judge proceeds to consider whether, under the circumstances, the rent is liable to enhancement; and if so, what is a fair and reasonable rate of rent. He says—" The ryot urges that there has been a large increase in all the costs of production, and it is admitted, even by the plaintiff's witnesses, that such has taken place. The ryot's witnesses, indeed, put the costs of production so high as to assert that for years back they have obtained no profit from their lands. This I utterly disbelieve. It is a very difficult matter to ascertain what are the real costs of production. The simplest mode of fixing a fair rate would be to ascertain what was the prevailing rate for new ryots in the neighbourhood, or, as it is put by the High Court, what is the rate which a tenant not having a right of occupancy would give? The principle is, that what is agreed upon by others willingly and of their own free will, must be a fair rate, inasmuch as people would not enter into arrangements under which they must incur a loss, but, it must be presumed, to make such engagements as will ensure them a fair profit on their capital, and a fair return for their labor. Unfortunately this last is wholly wanting in the present case. As the test of what non-occupant ryots pay cannot be applied to this case, it is necessary that the Court should go into the matter of the costs of production, and endeavour to ascertain, from a consideration of all the circumstances of the case, what rate ought to be fixed." He says—" It is generally admitted that a ryot can cultivate sixteen beegahs of land." But he adds, " it is proved, however, that he cannot do this unaided, but requires assistance at the time of ploughing, harrowing, smoothing, weeding, and cutting crop. He also possesses no capital, but, as a general rule, is obliged to borrow his subsistence during a great portion of the year from a mahajun, and to rely generally on loans of money, seed, and *dhan* from the mahajun to enable him to live and carry on his cultivation, and to purchase and renew his stock of cattle and implements with which such cultivation is carried on. On all loans of money he has to pay 37 per cent. and for seed he has to pay 100 per cent."

In estimating the expenses of cultivating sixteen beegahs, the Judge first takes into consideration the wages of the ryot. He says,—" In the first place, the ryot is entitled to receive the wages of his labor. He is specially retained for the cultivation of the land. He is obliged to live near his land to be always ready to cultivate it whenever the right time comes, and to watch and take care of the crops, both while they are growing and when they are ripe, and also until they are disposed of. The plaintiff's own witnesses put the fair wages

of such a ryot at 3 rupees a month, or 36 rupees a year; and I consider this to be a fair estimate." For additional labor, the Judge allows at the rate of six men for one day each per beegah, or ninety-six men for sixteen beegahs, which, at two annas per man per day, gives 12 rupees for extra labor. This item is not objected to by the plaintiff.

The seed is then taken at 1 rupee per beegah for the *dhan* and cold-weather crops, and is not objected to.

The keep of cattle and a boy to look after them are also allowed at the rate of rupees 12 for the sixteen beegahs, and the charge is not objected to.

These items amount together to 76 rupees.

36,	Wages.
12,	Extra labor
12,	Boy and bullock.
16,	Seed.
Rs. 76.	

As to these items, the Judge says,—"The direct wages of the labor and seed applied to the soil may then fairly be assessed at the rate of 76 rupees to the sixteen beegahs, or between 4 rupees and 5 rupees the beegah. This is for the *dhan* and cold-weather crops. For the single crop a proportionate deduction in the expense would have to be made."

In addition to this, the Judge says,—"The ryot has to keep a stock of cattle for ploughing. Four are required for each plough; and one plough and four bullocks, it is calculated, will cultivate sixteen beegahs of land in the year. The value of bullocks has increased, and cannot be taken at a lower price than 12 rupees per head. Their purchase alone costs him 48 rupees; a cow-shed to keep them in is admitted by the plaintiff to cost, with repairs, about 4 rupees; a *golah* to keep the grain in, he admits, costs 3 rupees. Lastly, the value of a plough, sickle, harrow, and all such implements of husbandry is, with repairs, not less than 3 rupees for the sixteen beegahs. To this is to be added the ryot's dwelling-house, which must cost at least 15 rupees. The total stock, therefore, does not stand a ryot under 73 rupees. It is admitted, on both sides, that the value of every one of these articles is very much beyond what it is was in former days. It is, of course, impossible to make an exact calculation as to the extent of increase. The real point, in fixing the present rent, is to ascertain the present expenditure. That which I have taken is only slightly beyond what the plaintiff himself admits." Of the items composing the seventy-three rupees, the cost of the ryot's dwelling-house, amounting to rupees 15, was objected to in the argument on behalf of the plaintiff.

The Judge proceeds—"We now come to the question of interest. The monthly wages of the ryot, are not advanced by the zemindar; nor are they advanced in money by the mahajun. The ryot lives, not with purchases made in money, but on the *dhan* cultivated on his own and the neighbouring lands. It may fairly be calculated that for one-half the year he lives on the produce of his own fields, on the crops he has himself cultivated. For the remaining half of the year he is obliged to borrow *dhan* from the mahajun. For this he has to pay fifty per cent., and it is to be recollected that he borrows when the market rate is high, while he repays when the market rate is low. He borrows when there is a comparative scarcity; he repays when the crop is abundant. It may then be considered that he has to pay interest on the wages of labor employed in cultivation to the extent of fifty per cent. for six months of the year. The wages have been held to be sixty rupees per annum for sixteen beegahs. The interest on one-half of this will, therefore, be eight rupees for six months." There is a slight error in calculation in this: it should be seven rupees eight annas, instead of eight rupees. It is altogether objected to by the plaintiff.

The next item is "interest on stock." As to this, the Judge says—"The money to build the ryot's houses, cow-sheds, and *golahs* and to purchase the plough, cattle, and implements of husbandry, is borrowed from the mahajun. I allow fifty per cent. upon the outlay on this account, to cover not only the interest on the capital invested, but also the renewal of the stock. At first sight this may be considered an excessive allowance. But when the risks to all buildings, *first*, from fire in the hot season, and, *secondly*, from the heavy rains,—and to cattle, from insufficiency of grazing ground and wet season,—are looked to, I think it is not too high. Then, again, it is to be recollected that the capital invested in cattle and buildings would, if converted into money, obtain interest at thirty-seven per cent. This item will add a sum of 36 rupees to the expenditure."

Having considered the item of interest, the Judge proceeds to the question of risk.

He says—"Again, there is the item of risk run by the ryots on the crop. It is well known, and an admitted fact by all parties, that the ryots have been great sufferers on this account. The heavy rains of the year 1268 injured the *dhan* crops very extensively. The consequent high price for *dhan* did not compensate for the loss thus incurred. The late rains of the years 1268 and 1269 injured the pepper, and *till*, and *kullie* crops. On the other hand, it is urged, on the part of the plaintiff, that the risk run on this account now is much less than formerly. It is said that heavy and serious inundations are less frequent than formerly, and that the level of the ground, generally, in the pergunnah has become higher. There may be some truth in this, but still the ryot does, as is apparent from the returns for the year 1268, run a very heavy risk; and I would not reckon it as under ten per cent., and I have some fear that I have in that sum taken too low an estimate. This risk, however, even at that rate, will add to the expenditure a sum of Rs. 15, taking the average value of the crop for sixteen beegahs to be Rs. 148."

Having ascertained the amount of the gross proceeds and the several items of expenditure, the Judge proceeds to consider what are the net proceeds of sixteen beegahs. He says—"The total of the outgoings on account of expenditure is therefore as follows:—

Wages of labor and seed	...	Rs. 76
Interest on do. ...	... ...	„ 8
Interest on stock...	... ...	„ 36
Risk on cultivation	... ...	„ 15
	Total, Rs.	135

As already shown, there is a miscalculation as to the Rs. 8; it should be Rs. 7-8. There is also a miscalculation as to the Rs. 36 for interest; it should be Rs. 36-8, *viz.*, 50 per cent. on Rs. 73. These two mistakes counteract each other."

The Judge then says—"We have, therefore, on a cultivation of sixteen beegahs a gross produce of Rs. 148, and outgoings to the amount of Rs. 135. It must be distinctly admitted that, on both points, I have taken a high estimate. I do not believe that Rs. 9-4 is by any means the common average produce of a ryot's land, and similarly I do not believe that every field costs a ryot Rs. 8-7 to cultivate. There are several Deputy Collectors making investigations on this subject in the Mofussil. They have declared the average produce of lands to be six, seven, and eight rupees. Mr. Beveridge has placed it at about the same sum as I have done, and Mr. Grey's estimate puts it at ten rupees; but these Deputy Collectors have equally placed the outgoings at a much smaller sum. There must, of course, be every variety of produce obtained from a beegah of land, consequent on variety of soil, variety of cultivation, and variety of crop."

In another place, the Judge says,—"Another difficulty, however, stands in the way of fixing the rate per beegah,—*viz.* that the plaintiff has made no distinction between the single *aman dhan* crop and the double *aus dhan* and cold-weather crops; while, according to the calculations, it would appear that the first returns a profit of one-half of the last, though at a nearly corresponding decrease in the costs of production. As a general rule, it is the fact that the two sorts of land and crop are pretty evenly distributed among the ryots. In this district there is less *bheel* land than in others, and where it exists of good quality, it bears as high a rate as the higher land. Indeed, it is preferred by the ryots. The cause is, that it produces the best *dhan* and the largest quantity of *dhan*, and it is on this *dhan* they live. They prefer obtaining in this way their food direct from their own lands to obtaining money from the cold-weather produce, and with it purchasing *dhan*. The latter mode of obtaining food brings them into the clutches of the mahajun, from which they do not escape without being heavily mulcted. It is also to be recollected that a ryot obtains some straw from his *dhan* crops, and that he is occasionally able to sow peas and other trifling crops on the edges of the *bheels*. To allow for fallow lands, and the inequality between the two sorts of crops, the net out-turn of Rs. 13 must be calculated as rent of twenty-three beegahs of land. Rs. 13 are 208 annas, which, divided by 23, gives a rent of nine annas per beegah."

It is not distinctly stated, what portion of the seven beegahs, which are added to the sixteen to make the twenty-three, is allowed for fallow, and what portion for inequality of crops; but in another part of the judgment, it is stated that "at least one-fourth of the land is left fallow."

It is unnecessary to examine minutely all the objections which have been urged by the plaintiff to the finding of the Judge as far as it relates to the value of the gross proceeds; for, assuming that they do not exceed Rs. 148 for sixteen beegahs, we are of opinion that the plaintiff is entitled to enhance the rent to the full amount which he has claimed.

The defendant has made only one objection as to that part of the judgment. He says in his 10th and 11th objections, that, in calculating the quantity of produce, and striking an average, the Judge, though admitting that there was land yielding only five or six *arrees* per beegah, excluded the same from his calculation. There are two distinct portions of the judgment to which these objections refer. In one of them the Judge says—"In the village to which this case relates, I had a beegah of *dhan* cut in my presence, which gave an out-turn of twenty-eight *arrees*. I had four cottahs of another beegah taken at random, cut, and it gave another out-turn of fifteen *arrees* per beegah. It was not thoroughly beaten out, and my impression was that the ryot would have obtained eighteen *arrees* from it. Other fields were pointed out to me, which it was stated would have only given seven and five *arrees*, but it was evident that the *dhan* in them was thin, and for some cause, either bad seed or bad cultivation, had not grown properly. I do not consider that such crop should be taken into consideration in framing an average produce." In the other, the Judge says—"The Deputy Collectors, in their local enquiries, have given, as their opinion, that fifteen *arrees* and eighteen *arrees* may be taken as a fair average. Those who have taken the lower estimate have included in the average crops producing only five and seven *arrees* the beegah. There has been a similar difference of opinion as to the produce of the cold-weather crops. These are estimated at three, four, and five rupees the beegah. Some of them, it is admitted, sell for one and a half and two cottahs the rupee. The seed required for a beegah is not less than a cottah, and surely it cannot be believed that the beegah does not return to the cultivator three or four times the seed at the very least. If the land is properly cultivated, it certainly must do so. As to the land having deteriorated to that extent that it now returns nothing, the very sight of the fields covered with fine crops, and the large extent of cultivation of the cold-weather crops is sufficient proof, to my mind, that such assertions are not the truth."

As to the first portion of the judgment to which the ryot's objections relate, we are of opinion that the Judge was clearly right in not including the fields in question in striking an average. They were merely some fields in the same village which were pointed out to him. No evidence was given in respect of them; and the Judge considered that the thinness of crops arose

from special causes. He was quite right in acting upon the evidence, rather than upon his own view of those fields which appeared to him to be exceptional.

As to the second portion of the judgment to which the objection relates, the Judge disbelieved the assertions upon which the Deputy Collectors acted in including in the average crops yielding only from five to seven *arrees* the beegah. We cannot, upon special appeal, interfere upon a mere question of fact, or say that the Judge was wrong in disbelieving the statements to which he referred.

It was not even contended in the course of the argument before us, on behalf of the ryot, that the Judge had committed an error in fixing the average produce of sixteen beegahs at 148 rupees. The main argument on both sides turned upon the items of expenditure. Therefore, without adverting to the plaintiff's objections with reference to this part of the case, we must take 148 rupees as the average gross proceeds of sixteen beegahs of land; and, assuming the finding on that point to be correct, we will next proceed to consider the outgoings:—

Labor of ryot at Rs. 3 a month, for the whole year	Rs.	36
Additional labor	„	12
Boy and bullocks	„	12
Seed	„	16
Total,	Rs.	76

We think the above charges ought to be allowed. They are the sums of which the first item, 76 rupees, in the Judge's estimate of outgoings, is made up. The next item is 8 rupees for interest at 50 per cent. for half a year on the first three items, amounting to 60 rupees. This charge is supported upon the ground that the ryot has to borrow his food from a mahajun for the first six months, at the rate of 50 per cent The item is objected to on the part of the plaintiff upon the ground that, in ascertaining the right of the land-owner, the Court cannot give the laborer interest upon his wages upon the ground that he has to borrow his food. But, whether the ryot borrows his food or not, it is clear that he cannot receive his wages out of the proceeds to his crops before the crops are gathered. If three rupees a month is a fair and proper rate of wages, when paid daily or monthly, as in the case of a hired laborer, the rate ought to be increased when the laborer has to wait nearly six months for them. The difference to a laborer between having his wages paid daily, and giving six months' credit for them, is the rate at which he can borrow the amount in the meantime. The Judge says that the laborer has to borrow his food from the mahajun and to pay 50 per cent. for it. It is, doubtless, a very high rate. We see no reason why he should borrow rice at 50 per cent. when he can borrow money at 37 per cent., and the reason given by the Judge clearly does not extend to the 12 rupees for additional labor, and 12 rupees for boy and bullocks. Further, as to the ryot's own wages, six months' credit is not given for the whole of the first half year; for, as to that portion of the time which expires immediately before the harvest, the ryot has a much shorter period to wait. A full period of six months intervenes between the time of the labor and the time of receiving the wages in the case of the first day's wages only; and even in that case the length of the period depends upon the time which elapses between the commencement of the agricultural year and the time when the crops are ready for consumption.

Again, it would be impossible for any one to calculate precisely what profits ought to be allowed on capital advanced to pay the additional laborers, and for boy and bullocks, without knowing the precise days on which the laborers are hired, and the time at which the crops are available for repayment of the capital.

In cases of this nature, it is evident that it must be impossible to make precise and accurate calculation. An approximation is all that can be expected or hoped for; and we cannot say that the Judge was wrong in adding the 8 rupees to the three items for labor, although his reasons for the charge as interest on half the amount at 50 per cent. for half a year, are not quite accurate. This item of 8 rupees is, however, not very material, so far as the present case is concerned, for the allowance or disallowance of it will not affect our decision. The ryot contends, on the other hand, that 3 rupees a month is too low a rate of wages, and he refers to that part of the judgment in which two annas a day are allowed for additional laborers. But that allowance is made to laborers hired for short periods, and at times at which it may be reasonably supposed that labor is in greater demand than at other periods of the year. We cannot say that the Judge was wrong, in point of law, in fixing the ryot's wages at only rupees 36 a year, any more than we can say that he was wrong, in point of law, in allowing the additional item of 8 rupees.

The next item allowed by the Judge is interest on stock. The stock is valued at 73 rupees, and the interest is calculated at 50 per cent., viz. 37 rupees per cent. for interest on capital, and 13 rupees per cent. for renewal of stock. The several items of which the 73 rupees are composed are—

Four Bullocks at Rs. 12 ...	Rs.	48	0	0
Cow-shed	„	4	0	0
Golah for grain	„	3	0	0
Plough and other implements	„	3	0	0
Total,	Rs.	58	0	0
Ryot's house	„	15	0	0
Grand Total,	Rs.	73	0	0

It is objected, on the part of the plaintiff, that the ryot, having been allowed his wages, is not entitled to be provided with a house at the expense of the landlord. The 50 per cent. on this item amounts to rupees 7-8. We think that this sum cannot be allowed, in point of law, on account of a house. An allowance for a house

cannot be made in addition to a fair allowance for wages; for, as contended by the learned Counsel for the plaintiff, there is no stronger reason for allowing a house in addition to wages than there is for allowing clothes and food.

The tenant must find his own house, and if rupees 7-8 a year are necessary for that purpose, the amount must be paid by the tenant. The Judge has not, in express words, found that 3 rupees a month is a fair rate of wages, if a house is provided at the expense of the landlord; but we cannot say that his finding is not substantially to that effect. If he had stated that three rupees a month is a fair rate, if rupees 7-8 a year are allowed for a house, otherwise that rupees 3-10 per month is a fair rate, we could not have reversed the finding, and the amount in that case would have been the same as three rupees a month for wages and rupees 7-8 a year for a house.

The witnesses generally proved that from 3 rupees to rupees 3-8 a month was a fair rate of wages; and in one of the cases now before us upon appeal—the case of *James Hills* vs. *Lukhun Biswas*—the Collector, Mr. Grey, allowed wages at the rate of 42 rupees a year, or rupees 3-8 a month. The Judge has reduced the wages from 42 rupees to 36 rupees a year, or from rupees 3-8 to 3 rupees a month; but it is not clear that that reduction was made wholly irrespective of the fact that, in another part of his calculation, the Judge has allowed rupees 7-8 a year for a house.

As the several appeals were treated as analogous, and, with two exceptions, were argued as one case, we think that we may very fairly refer to the judgment in the case of *Hills* vs. *Lukhun Biswas* on this point. In that case, the Judge says—"It is, for the plaintiff, strongly objected that the dwelling-house should not enter into the question of stock; that the ryot is allowed three rupees a month as the wages of his labor; that other laborers who receive that sum are obliged to find their own houses; and that the agricultural laborer is entitled to no better terms. I am not satisfied that the allegation on which this objection is raised is the fact. When agricultural labor is imported from other parts of the country, the laborers are provided with houses, and they are afterwards obliged to repair and renew such houses out of their own savings." From this it appears clear that, in the Judge's mind, the sum allowed for wages and the Rs. 7-8 a year included on account of a house in the Rs. 36 charged for interest on stock, were so connected that we cannot see with any degree of certainty that the allowance for wages was not made at the rate of Rs. 36 a year, instead of at a higher rate in consequence of the allowance of Rs. 7-8 a year for a house.

If, therefore, it were necessary to disallow the amount charged for a house for the ryot, we could not do so without remanding the case to the Judge to ascertain whether, in point of fact, the thirty-six beegahs a year allowed for wages is a reasonable rate, if nothing is allowed for a house; and if not, what would be a reasonable amount under such circumstances? But it is not necessary to remand the case for this purpose; for, even admitting the Rs. 7-8 to be charged as an outgoing, in addition to the Rs. 36 allowed for wages, the plaintiff is still entitled to the full amount claimed.

All that we can do is to say that a charge for a house cannot be allowed in addition to a proper sum of wages. The Rs. 7-8 will, therefore, be deducted from the Rs. 36-8, charged as interest upon stock, reducing that sum to Rs. 29. But, as the case is not to be remanded, the Rs. 7-8 must be allowed in this particular case as a charge in addition to the amount allowed for wages, for it might or might not be allowed upon a remand as an addition to the wages already allowed. It not being necessary to remand the case upon that point, for the reasons above given, the tenant must have the benefit of that amount for the purpose of the present judgment.

To show how inaccurate it would be to ascertain the rent per beegah by taking the average gross proceeds, and the expenses of cultivation of sixteen beegahs, and allowing Rs. 7-8 for a house as one of the outgoings, we need merely refer to the cases of *Hills* vs. *Guddadhur Biswas*, and of *Hills* vs. *Kootub Biswas*, now before us in appeal, in which the ryot's rents have been fixed at nine annas a beegah upon the principle of allowing Rs. 7-8 as an outgoing on account of a house for each sixteen, or rather for each twenty-three, beegahs. The former holds upwards of 280 beegahs, and the latter upwards of 106 beegahs; the former, therefore, gets allowance for upwards of twelve houses, and the latter for upwards of four. Similar remarks might also be made as to the allowance of wages for a whole year, upon the ground that it is necessary for the ryot to superintend and look after his crops, &c.; whereas one ryot could probably look after 280 beegahs, and would, therefore, not require a laborer constantly employed to look after each sixteen beegahs of his holding. It may also be doubtful whether forty-eight bullocks, the rate allowed, would, in fact, be necessary or be kept by a ryot for a holding of 280 beegahs. These points are not important, however, in the present case; for, allowing the full amount of wages, and Rs. 7-8 in addition for each sixteen beegahs, and also the full number of forty-eight bullocks, the plaintiff is entitled to the full amount of rent claimed. If the case had been different, it would have been necessary to remand the case of Guddadhur Biswas, and some other cases, for a further investigation of facts, which, for the sake of all parties concerned, we should have deeply deplored. We merely point it out with reference to other cases that may arise.

The next item is "risk on cultivation." The sum of Rs. 15 allowed on this account is taken in round numbers as 10 per cent. on Rs. 148. As to this item, the Judge says in the paragraph already quoted—"Again, there is the item of risk run by the ryots on the crop. It

is well known, and an admitted fact by all parties, that the ryots have been great sufferers on this account. The heavy rains of the year 1268 injured the *dhan* crops very extensively; the consequent high price for *dhan* did not compensate for the loss thus incurred. The late rains of the years 1268 and 1269 injured the pepper, and *til*, and *kullie* crops. On the other hand, it is urged on the part of the plaintiff that the risk run on this account now is much less than formerly. It is said that heavy and serious inundations are less frequent than formerly, and that the level of the ground, generally, in the pergunnah has become higher. There may be some truth in this, but still the ryot does, as is apparent from the returns for the year 1268, run a very heavy risk; and I would not reckon it as under ten per cent., and I have some fear that I am in that sum taking a low estimate."

It is remarkable that the Judge should have taken the heavy rains in 1268 and 1269 as instances of the risks which the tenants have to run, when, according to his own showing, both the quantity and value of the crops of those years must have been taken into the calculation upon which he came to the conclusion that the average gross proceeds of those years were diminished by the heavy rains of 1268 and the late rains of 1269. The loss must have been taken into consideration in calculating the average. Such loss cannot properly be taken into consideration twice over; *first*, in ascertaining the average quantities and prices, and *secondly*, in making an allowance for risks based upon injuries done to the crops of which the quantities and prices must have been taken into consideration in calculating the average. Taking the crops of 1267 and 1268 into consideration, without reference to the crops of 1269, the Judge considered that the proceeds had doubled; but, taking them in connection with those of 1269, he considered that they had increased in respect of the *dhan* crops to the extent of Rs. 1-4 per beegah, and in respect of the cold-weather crops to the extent of Rs. 2 per beegah. The rains of 1268 did not diminish the quantity or quality of the crops of 1269, nor *vice versâ*, although the prices of 1269 affected the average prices and reduced the average gross proceeds.

In taking the average, crops which were destroyed or injured could not have been estimated at the same rate as if they had sustained no injury. According to the view taken by the Judge, the risks have rather diminished than increased of late years.

With reference to this part of the case, we may also refer to another passage in the judgment. The Judge there says—"The plaintiff's mistake has been to calculate the average, Rs. 14 per beegah. That is far too high an average. It was too high an average when the scarcity caused prices to rise in the years 1266 to 1268. If the rates in 1268 had continued to prevail, and had remained permanent, Rs. 12 per beegah might have been taken as a high average. But the year 1269 has clearly proved that the rates of 1268 were only temporary, and those rates therefore cannot be taken into consideration in fixing a rent such as will hold fair and equitable for the next ten years."

But, independently of these considerations, it appears that the ryot has been allowed 37 per cent. for the capital employed in the cultivation, and 13 per cent. for wear and tear or renewal of stock. The profit on capital is allowed at a very high rate. It is 25 per cent. above the rate of interest allowed by this Court. When profits on capital employed in a particular business are above the ordinary rate, and apparently high, it is on account of some risk with which the employment of it is attended. When a high rate of profit on capital is allowed, it must be considered as covering such risks. The land-owner cannot be charged with a rate of interest or profit on capital far beyond the ordinary rate of interest or profit, and also with an allowance for ensuring the return of the capital with such extraordinary rate of interest. It is contended that the ryot borrows the capital at 37 per cent., and therefore that he ought to be allowed a profit upon it in addition to the rate of interest which he pays to the mahajun, and that he ought also to be secured against all risk. But the ryot, according to the calculation of the Judge, is a mere laborer, who is obliged to borrow his daily food at the rate of 50 per cent. interest, and the necessary capital at the rate of 37 per cent. The rate of interest charged for the loan of the food, as well as for the loan of capital, does substantially include the risk. The 100 per cent. profit allowed on seed must also cover the risk in respect of that article. If the land-owner, in having his rent fixed compulsorily, is charged for that risk once in the shape of a high rate of profit on capital, or, what is the same thing, a high rate of interest for the capital borrowed by the ryot, he cannot be charged a second time with an allowance to cover the risk; nor can he be charged with interest or profits on capital twice, because the ryot, instead of employing his own capital, is compelled to borrow it. The profit on capital must go to the person who supplies the capital; and if the land-owner is charged for it once in the shape of high interest, he cannot be charged for it a second time in the shape of profit to the ryot for the use of capital which is not his own. The Court can only look at the capital employed as if it belonged to the ryot. It is no part of our duty to enquire where or how he procures it. The rate of interest charged by the mahajun can only be taken into consideration with a view to ascertain what is the rate of profit ordinarily required for capital when it is employed in agriculture and is subject to the risks incurred by so employing it. We cannot fix one rate of rent for a ryot who expends his own capital, and another for a ryot who is compelled to borrow it.

Further, as to prices, the Judge, in taking the estimate of Rs. 2 per beegah, instead of Rs. 3 as the increase in the value of the cold-weather crop, says—"I think it right to take the lower

sum, and thereby to allow for a fall in the market rate." This difference alone is more than 10 per cent. upon the amount of the average gross proceeds. We think, that, for the reasons above given, the Rs. 15, charged on account of risk, must be disallowed. If the sum be deducted, the outgoings, instead of amounting to Rs. 135, will amount to only Rs. 120-8; and the net out-turn, instead of being Rs. 13, will be Rs. 28. This sum, if taken instead of Rs. 13, as the rent of 23 beegahs, gives Rs. 1-3-5, instead of nine annas as the rent per beegah. The sums which we allow as outgoings are—

1st,—Wages of ryot	Rs.	36	0	0
Additional labor	"	12	0	0
Boy and Bullocks	"	12	0	0
Interest on half the above sum at 50 per cent. for half year, as allowed by the Judge... ...	"	8	0	0
Seed	"	16	0	0
Sum deducted from interest on stock, as allowed by the Judge on account of a house for the ryot, but which cannot be wholly disallowed in this case without remand to ascertain whether it should be added to wages	"	7	0	0
Interest on stock, as allowed by Judge at 50 per cent., after deducting Rs. 7-8, included on account of allowance for a house in the Rs. 36-8 allowed by the Judge	"	29	0	0
Total Rupees ...		120	0	0

If, in consequence of the risks contemplated, the proceeds of sixteen beegahs should be diminished to the extent of ten per cent., the gross proceeds would amount in round numbers to Rs. 133 instead of Rs. 148.

If Rs. 27-8 be deducted on account of rent from that sum, there would remain a sum of Rs. 105-8 to cover the outgoings:—

Gross proceeds	Rs.	148	0	0
Deduct 10 per cent. for loss of, or injury to crops	"	15	0	0
Total Rupees ...		133	0	0
Deduct for rent	Rs.	27	8	0
Balance of proceeds	"	105	8	0

That sum would be sufficient to cover all the outgoings except interest on stock at 50 per cent. But, if the rate of interest on stock were reduced to 25 per cent. instead of being allowed at 50 per cent., the last item allowed by us on account of outgoings, would be reduced from Rs. 29 to Rs. 14-8, and the outgoings would then amount to Rs. 105-8 instead of Rs. 120, and the balance of gross proceeds, after deducting the Rs. 27-8 on account of rent, would be equal to the outgoings, reduced by allowing 25 instead of 50 per cent. for interest upon stock. The interest allowed in that case at the rate of 25 per cent. would be sufficient to give 12 per cent. profit on capital expended (a rate equal to the Court's rate of interest) and 13 per cent. for renewal of stock. Thus, if the loss intended to be provided against by the allowance made by the Judge on account of risk, should happen, the ryot would receive, on all capital invested, a profit at the rate of 12 per cent., and also 13 per cent. for renewal of stock. On the other hand, if the loss should not happen, he would get 37 per cent. profit on capital, and 13 per cent. for wear and tear, or to replace his stock. Surely, then, he cannot be entitled, at the expense of the land-owner, to the sum allowed by the Judge for risk, when the only risk to be incurred is that he may possibly get only 25 per cent. instead of 50 per cent. on the capital employed. We cannot, as before observed, look to the fact that the ryot is conducting the business with borrowed capital. If he is obliged to borrow, he must make such a bargain with the mahajun as will throw upon him who receives the profits of the capital the risk which is run by so employing it. If the ryot makes an improvident bargain with the mahajun and consents to bear the risk whilst the mahajun is to receive interest for his money at the rate of 31 per cent., the land-owner ought not to suffer on that account, and be allowed a lower rate of rent. But the mahajun, when he lends the capital at 37 per cent. interest, does, in reality, run whatever risk there may be of the crops being injured by rains or other casualties, and consequently not producing sufficient to repay the capital with 37 per cent. interest thereon. The legal liability of such a person as the ryot is found to be, to pay the money whether the crops fail or not, even if such be the strict terms of his contract with the mahajun, is merely nominal, and cannot be considered by the mahajun of any value. It is not material to determine, in this case, whether the sum of Rs. 28, according to the first calculation which we have made, or the sum of Rs. 27-8 according to the last calculation, should be allowed to the land-owner as rent for the twenty-three beegahs of land. Either of these sums would give him an amount of rent exceeding what he asks. The last calculation was made rather for the purpose of showing the correctness of the first. According to either of the calculations, the rent would amount to Rs. 1-3 a beegah, without taking fractions of an anna. We think that that amount is a fair rate of rent for the *matan* lands, and that the plaintiff is entitled to have the rent for the *matan* lands, held by the defendant, enhanced to one rupee per beegah. This is less than one-sixth of the gross proceeds, and allows him only ten annas eight pie out of the Rs. 3-4 increase per beegah; the remainder of such increase amounting to Rs. 2-9-4 being allowed to the tenant on account of outgoings.

The Judge says,—

"I am convinced that the rate in question, that is nine annas a beegah, will fall hard upon no ryot. The smallest farmer will be able to pay it. The poorest ryot will not be injured by

it. I do not mean to lay down that the latter class of ryots might not pay a higher rate. But the plaintiff, Mr. Hills, has made no distinction whatever; and, therefore, on his general evidence I can only declare a general rate which will include all ryots."

The rate of rent which the landlord has a right by law to demand, does not depend upon the size of the holding or the circumstances of the ryot.

What is a fair and equitable rate for one ryot for the lands of a similar description, and with similar advantages in the same neighbourhood, must also be fair and equitable for another, so far as the landowner is concerned. No such distinctions were made when the Government assessed the land tax, and received the revenue through the zemindars, and no such distinctions ought to be made now.

In the other judgment to which we have referred, the Judge says—"My firm conviction is that such a rent as one rupee per beegah is more than the ryot can pay."

Further, in the judgment now under consideration, he says—"As to the rate of one rupee per beegah, my impression is that its immediate imposition would at once drive the ryots from their homes, or place them at the mercy of Mr. Hills, who would grant them remission of rent on their agreement to sow indigo."

We confess that we do not feel any apprehension that the rent of one rupee per beegah is too high or more than the ryot can pay, or that the imposition of it will drive them from their homes.

Looking at the importance of the case, we have given it our most careful attention, and we have no reason to believe that our decision will impose any hardship upon the ryots. But even if, unfortunately, we had come to a different conclusion, we should have been bound to administer the law without regard to consequences.

Taking the calculations of the Judge, and allowing Rs. 148 as the gross produce of sixteen beegahs, or rather of 23 beegahs, which, according to the calculation, must be held by the ryot in order to enable him to obtain those proceeds, the nine annas per beegah which the Judge has allowed for rent is not quite one-eleventh of the gross proceeds, whereas, formerly, the ryots were generally taxed in the proportion of one-half of the produce of their land.

Mr. Shore, in his Minute, with reference to the revenue assessment, says—

"To form a correct judgment of the weight of the assessment upon the country generally, we ought to possess the following *data*:—*First*, a knowledge of the rents actually paid by the ryots compared with the produce of their labor; *second*, accurate accounts of what the zemindars and farmers collect, and of their payments to Government; *third*, detailed accounts of the alienated lands, showing the quantity of them, the persons to whom they were granted, the dates of the grants, and those by whom they are now held, in order to determine how far a resumption should take place. All the material part of the information is wanting, and to procure it would require much time and indefatigable research. But there are certain points connected with it which are ascertained, and these may enable us to adopt some probable conclusion, though less certain than what the premised information would afford. I believe that the ryots in Bengal are generally taxed in a proportion of one-half of the produce of their labor, and we must, therefore, admit that the assessment with respect to them is full as much as it ought to be, supposing it even to be one-third: that it is so seems to be the general opinion, whether the stated proportion be just or not."

Mr. Grant, in his observations on the Revenue of Bengal, considered the right of Government limited to a fourth part of the actual gross produce of the soil, subject to a deduction of 20 per cent. for charges of zemindaree agency and other disbursements; whilst Mr. Shore declared his opinion that "the revenue to be thus derived, after providing for the necessary allowances, would fall short of its actual amount."

Mr. Colebrooke, in his remarks on the husbandry of Bengal, speaking of the tenure for payment in kind, says—"In the rule for dividing the crop, whether under special engagements or by custom, three proportions are known:—

For the Landlord.	*For the Tenant.*
One-half.	One-half.
One-third.	Two-thirds.
Two-fifths.	Three-fifths.

"These rates, and others less common, are all subject to taxes and deductions similar to those of other tenures, and in consequence another proportion engrafted on equal partition has, in places, been fixed by Government in lieu of all taxes, such, for example, as nine-sixteenths for the landlord and seven-sixteenths for the husbandman."

There can be no doubt that these rates were very heavy upon the ryots, and that when the rent was paid in kind, the zemindar, as well as the tenant, ran the risk of failure in the crops. But there is a wide difference between one-half, or even one-fourth, and one-eleventh of the gross proceeds.

Again, if the calculation of the Judge be correct as to the amount of outgoings, the expense of cultivating sixteen beegahs of land is equal to the rent of 240 beegahs, at the rate of nine annas per beegah; and it should be borne in mind that, out of this rent, the Government revenue has to be paid by the zemindar. The plaintiff, it must be admitted, is merely a *dur-putneedar*; but that makes no substantial difference, for his title to receive the rent is derived from the zemindar. The increase in the value of produce is rupees 3-4 per beegah, that is one rupee four annas per beegah for the rice crop and two rupees per beegah for the cold-weather crops. Of this the Judge allowed three annas eight pie to the landlord as an increase to his rent; the remainder, amounting to rupees 3-0-4 per beegah, being allotted to the tenant on account of outgoings.

We refer to the above points, not with a view to show that, excluding the item for risk, the sum allowed by the Judge for outgoings is too high, but merely to show that a ryot, who, if the Permanent Settlement had not been carried into effect, would probably have been allowed, for the outgoings of one beegah, a sum not exceeding one half of the gross produce thereof, and would have had to pay the other half to the Government as revenue, cannot be said to be over-assessed when he is allowed to retain at least five-sixths of the gross proceeds for his labor and profits on capital, and called upon to pay something less than the other one-sixth as rent to the zemindar who has been declared to be the proprietor of the soil, and who has to pay the Government revenue out of his rent.

The ryot contends that a share of the net profits ought to have been reserved for him; that he, being a ryot possessing a right of occupancy, had an interest in the land. The present case is that of a ryot having a mere right of occupancy, and not a right to hold at a fixed rate of rent. It is a mistake to suppose that such a ryot has any interest in the land which gives him a right to a share of the rent. He has merely a right to occupy the land in preference to any other tenant so long as he pays a fair and equitable rent. The ryot in his first objection, has confounded the net proceeds, after deducting the outgoings or expenses of cultivation, with the amount of the increase in the value of the produce. He may or may not, according to circumstances, be entitled, on account of increased expenditure, to a share of the increase of proceeds, but he is not entitled to a share of the net proceeds or rent of the land. If the rent be fixed at one rupee a beegah, he will, as already shown, receive rupees 2-9-4 per beegah, out of the rupees 3-4 increase, whilst the land-owner will receive only ten annas eight pie per beegah out of the increase, in addition to the former rent.

The ryot complains that the Judge has not taken into consideration the ordinary rate of profits derived from agriculture in the neighbourhood. But the Judge has done this as well as the evidence would enable him, and has allowed the full rate of interest of profit, *viz.*, 37 per cent., which is usually taken by those whose capital is so employed. He may have allowed too high a rate; and the plaintiff complains that he has done so; but this is in favor of the ryot, and not to his prejudice.

The ryot also complains that the Judge has not taken into consideration the rise in wages, or the decrease in the productive powers of the land; that he has not made him an allowance for a cart or for the labor and expense of carrying the produce to market or converting it into money; and that he has not allowed him a Chowkeydar for watching the crops. These are all questions of fact with which the Judge has substantially dealt; and they form no ground for special appeal.

Both parties complain that the Judge has fixed the rent for ten years. This is clearly an error on the part of the Judge. He says—"I do not look upon it that I am fixing a rate for one, but for ten years. That is the intent with which I have come to the conclusion. Though, under the law, I have no power to fix the rate for any special length of time, still the law never could have intended that this sort of enquiry should be carried on from year to year, or that it should be admitted at all except on very clear proof and under very clear circumstances."

The Judge is quite right in supposing that a fresh enquiry is not intended to be carried on every year. When once the rent is fixed, it will continue to be the rent of the holding, until fresh circumstances arise which will justify enhancement under Section 17, or will entitle the ryots to claim an abatement. These suits are not suits by ryots for delivery of pottahs; but by a land-owner, in some cases to recover rent at enhanced rates, and in others for kubooleuts at enhanced rates. A land-owner cannot compel a ryot, who has a right of occupancy, to continue his holding for 10 years against his wish, and the rent cannot be fixed for such a period in a suit by the land-owner.

In a suit by a ryot having a right of occupancy, for the delivery of a pottah, if the parties do not agree as to the term, the Collector may fix such a term as he may think proper, not exceeding 10 years, subject to the proviso contained in Section 76 Act X of 1859. But this does not extend to cases in which a land-owner sues for a kubooleut. The difference between the two cases is this, that a right of occupancy is the right of the ryot. It does not also give the landlord a right to compel him to continue his occupation. The Judge, therefore, cannot fix the term, either in those cases in which the land-lord sues for rent, or in those in which he sues for kubooleuts. In those cases in which the land-owner sues for rent, we declare that he is entitled to rent at the rate of one rupee per beegah for the *matan* lands, that being the full amount claimed. As to the other lands, the rent will remain as heretofore; no ground for enhancement having been proved as regards such lands.

In those cases in which the land-owner sues for kubooleuts, we declare that he is entitled to a kubooleut at one rupee per beegah for *matan* lands, and for the other lands at the old rate of rent. If the ryots refuse to execute kubooleuts, the decree will have the effect given to it by Section 81 of Act X of 1859.

Mr. Hills does not press for costs against the ryots. Each party will, therefore, in this and in the other cases, bear his own costs, both in this Court and in the lower Courts.

Having decided the case, there is one point upon which we think it right to remark.

In one part of his judgment, which we have already quoted for another purpose, the Judge says—"As to the rate of one rupee per beegah, my impression is that its immediate imposition on the ryots would at once drive them from their homes, or place them at the mercy of Mr. Hills, who would grant them remission of rent on their

agreement to sow indigo. The ryots openly assert that Mr. Hills' demand is made with that view."

We think that such a remark was improper, and ought not to have been made. The Judge should have decided the question of right without considering the object with which Mr. Hills demanded that which he considered to be his right. The Judge should not have given heed to the assertions of the ryots as to the intentions of Mr. Hills. Even if that gentleman had the intention of granting the ryots remission of the rent to which he was justly and lawfully entitled, as an inducement or consideration to them for sowing indigo, there was nothing illegal or immoral in such intention. However impartial a Judge may be, it behoves him always to be careful in his remarks that he do not lead the litigant parties to believe that his judgment has been influenced by extraneous circumstances. That the observations to which we have alluded have had that effect in the present case, is evident from the fifth ground of appeal on the part of the plaintiff, in which it is said that "the Judge, as appears by his own judgment has allowed his mind, during the enquiry, to be unduly influenced in favor of the ryots by considerations foreign to the enquiry before him, and by statements wholly unwarranted and unsupported by any evidence as to the plaintiff's demand of one Rupee per beegah being made for the purpose of placing the ryots at the mercy of the plaintiff, and enabling him to compel them to sow indigo."

We have no doubt that the remark in this case was made without due reflection; but we do not consider it right to pass it over in silence.

It is not for us in this place to comment upon the Acts of the Legislature, or to suggest amendment of the law. We have merely to administer it as we find it. But we think that we may fairly point to this case as an example of the difficulties which have been created by some of the provisions of Act X of 1859, and of the vast amount of litigation harassing both to landowners and ryots, which must necessarily arise, unless that Act be amended.

The 19th September 1863.*

Present:

The Hon'ble J. P. Norman and E. Jackson, *Judges.*

Case No. 57 of 1863.

Enhancement—Ryots having right of occupancy.

Special Appeal from a decision passed by Mr. E S. Pearson, Judge of Tirhoot, dated the 13th September 1862, reversing a decision passed by Moulvie Mahomed Natuck, Moonsiff of Mozuffurpore, dated the 30th June 1862.

Puhlwan Thakoor and others (Plaintiffs) *Appellants,*

versus

Godooree Koonwur and others (Defendants) *Respondents.*

Baboo Lukhee Churn Bose for Appellants.

None for Respondents.

In the absence of express stipulation or of a right such as is mentioned in Sections 3 and 4 Act X of 1859, all ryots having rights of occupancy are liable to have their rents enhanced if such rents are below the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

The plaintiff sues for enhancement of the rent of 34 beegahs of land held by the defendant as his ryot, on two grounds, *first*, that the rent paid by the defendant is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. *Secondly*, that the value of the produce or the productive powers of the land have been increased otherwise than by the agency, or at the expense of the ryot. It appears from the decision of the Court that the rate of rent payable by the defendant is below that prevailing for lands of a similar description and with similar advantages in places adjacent.

As to the rice land, it is admitted that its productive powers have been increased by the railway embankment which prevents the inundation of the land, and no question arises as to it.

The defendant held 34 beegahs of land, 12 beegahs 18 cottahs of which he has converted from rice lands into garden lands, 27 cottahs into homestead land. The Judge has awarded for this land the prevailing rate for garden and homestead land, *viz.*, 4 rupees the beegah.

The defendant appeals. We may observe that the defendant has held the land under pottah for a period of 22 years and upwards. He states that he improved the land by building and making the garden, and he contends that he ought to be exempted from enhancement and assessment of the rent as upon homestead and garden land, on the ground that the increase in value of the land is due to his own labor.

The defendant is of course not called on to pay rent for the *house* he has built on the land. As far as regards the rent of the *land*, we think that the intention of the Legislature was not to give the tenant, who takes waste or unimproved lands, a right to hold such lands permanently at the rate which they were worth when originally taken by him; but that the zemindar, as well as the ryot, should benefit by the permanent improvement of the land. We think that the language of the 17th Section gives to the zemindar a right to claim enhancement, if he can shew the existence of any one of the grounds mentioned therein. The only privilege as to rent, which the law confers on a ryot with right of occupancy, is that he may hold at a fair and equitable rent. If the rent assessed is that which all his neighbours are paying, he cannot object that such rent is not fair and equitable, though the right to enhancement of the rent of the land is based on the alteration

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* It has been suggested that the above case, though not a Full Bench one, should be included in this No.

in its character caused by his occupation and improvement of it. No doubt a zemindar, with a well understood regard to his own interest, would be likely to allow an improving tenant to hold at a lower rent for such a time as would induce him to make improvements. If the tenant desire to secure the benefit of such improvements for himself, he must take care of his own interests by express stipulation to that effect.

The plaintiff does not say that, in consequence of the great productiveness of this particular garden land, or its state of cultivation, he is entitled under the 2nd Clause of Section 17 to higher rates than those prevailing in the neighbourhood for land of a similar character; but the ryot urges that, as he would be exempted from enhancement under the 2nd Clause, he is also exempted under the 1st.

We cannot shut our eyes to the fact that the alteration in the nature of this land which fits it at present for garden cultivation, and for the homestead, must be due in part to the effects of the embankment already spoken of.

If the ryot could shew that the land is at present such that it is only capable of profitable cultivation as a garden by the special expenditure for that purpose of the ryot's labor or capital—as for instance by works for irrigation constructed by the ryot, or by means of a well dug and apparatus for lifting water maintained at considerable expense by himself—the case would not fall within the 1st Clause of Section 17, and the ryot would be exempted from enhancement under the 2nd Clause.

But to hold that the tenant alone is entitled to the benefit of permanent improvements which alter the character of the land would be to fix the condition of the zemindars, while all around them is in progress.

No zemindar would agree to such terms in a lease except to secure some corresponding advantage. We think, then, that it may be laid down as a general rule, that, in the absence of express stipulation, or a right such as is mentioned in the 3rd and 4th Sections of Act X, all ryots having rights of occupancy are liable to have their rents enhanced, if such rents are below the rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

The 28th September 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Pre-emption (among Hindoos in Western India).

Case No. 1116 of 1861.

Special Appeal from a decision passed by Mr. W. Wright, Principal Sudder Ameen of Bhaugulpore, dated the 2nd April 1861, reversing a decree of the Moonsiff of Umerpore, dated the 27th August 1860.

Fukeer Rawot and others (Plaintiffs) *Appellants,*

versus

Sheikh Emambuksh and others (Defendants) *Respondents.*

Baboo Juggadanund Mookerjee for Appellants.

Moulvie Aftabooddeen Mahomed for Respondents.

A right or custom of pre-emption is recognized as prevailing among Hindoos in Behar and some other provinces of Western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved. Such custom, where it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown. The Court may, as between Hindoos, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption. But the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law.

THE question submitted to us by the referring Judges in this case is whether, when a right of pre-emption is claimed and admitted among Hindoos in Western India, the exercise of that right is to be regulated by the Mahomedan Law of pre-emption, or is to be regarded as an independant custom based upon the constitution of Hindoo Society itself wholly irrespective of the Mahomedan Law.

Mr. Justice Campbell is of opinion that all the earlier decisions, as well as administrative experience, establish the latter view; and that the ruling of the late Sudder Court, dated the 25th July 1843, and the numerous decisions which have since followed that ruling, were wrong. Mr. Justice Bayley intimates a doubt upon the point.

Select Reports, Vol. VII, page 129.

The question, we may observe, relating to this right, is two-fold—*first,* as to the circumstances under which it may be allowed; *second,* as to the manner in which it is to be asserted.

Mr. Justice Campbell thinks that, on the one hand, Mahomedan Law sanctions the right in cases where Hindoo custom would not permit the claim, such as mere vicinage; and, on the other hand, the Procedure enjoined by the Mahomedan Law is absurdly technical and, as such, oppressive.

The argument before us on this occasion throwing but little light on the subject, and the text books of Hindoo Law being wholly silent upon it, we have carefully compared the reports of decided cases, including a few from the North Western Provinces.

The Bengal cases are noted in the margin. They range from 1792 to 1862, including a case decided in this Court by Trevor and Morgan, J J.

1 Sel. Rep. p. 1
3 " " " 17
5 " " " 68 & note p. 71
" " " " 307
6 " " " 82 & 83
" " " " 163 & 277
7 " " " 129

With regard to the pre-

1 Sevestre p. 27
S. D. A. 1847 p. 22
" " 1848 pp. 122, 359, 533, 894
" " 1852 p. 859
" " 1853 " 704
" " 1855 " 12
" " 1857 " 525
" " 1858 pp. 427 771 & 1754
" " 1859 pp. 714 & 746
High Court 1862 I Hay's Rep. p. 32

cedent of 1843 in the 7th Select Reports, we do not find that it decided any thing more than that the right of pre-emption, where it was recognized among Hindoos on the ground of custom, was to be governed by the rules and restrictions of Mahomedan Law whence, the Court observed, the right derived its origin. These rules and restrictions we understand to have reference to the mode of asserting the right. The ruling was not a mere *obiter-dictum*, for the point was directly in issue in the case. The same view has been adopted without hesitation and even without question in all the decisions since that time; and on referring to the earlier cases in the Select Reports, we think the view taken in 1843 by no means inconsistent with those precedents, and we think it fully borne out by the leading cases in the North-Western Provinces* marginally noted.

* Agra S. D. A. Rep. 1849 p. 137, 1850 " 21, 1852 " 227, 1856 " 393

We proceed to notice briefly the old cases cited in Morley's Digest I. page 535 under the somewhat misleading title, "Hindoo Law of Pre-emption."

First in order is the oldest reported case 1 Sel. Rep. page 1. In that case (from what zillah does not appear)† an estate had been separated into two distinct parts, paying revenue separately to Government, and thus being quite independent estates. The owner of one part sold a moiety of it to a stranger, and the owner of the other part claimed a right of pre-emption, all the parties being Hindoos. The Court held, with the majority of the Pundits, that the plaintiff had no such right. The Mahomedan Law does not seem to have been appealed to on either side, and it seems very doubtful whether even Mahomedan Law would have countenanced such a claim.

† But the Reporter in the note at page 72 of the 5th Vol. speaks of it as a Bengal case.

The next (3 Sel. Rep. p. 17) is a Bengal case, and it is admitted that the right of pre-emption is not recognized under any form in Bengal proper.

We now come to the two cases in the 5th Select Reports, one at page 78, and one in the note in that case at page 71

In the latter of these two cases, which was the earlier in point of time, it is curious to find the Pundits asserting the existence of a right of pre-emption founded on *vicinage* under Hindoo Law, and supporting their opinion by the only text that has ever been adduced from any Hindoo authority on the subject, and that a work of a mythological rather than of a legal character. In that case it seemed that "both parties, though Hindoos, referred to the Civil Law of the Arabs," and the suit was ultimately dismissed on the ground of plaintiff's failure to assert his right in sufficient time. The plaintiff, it appears, claimed both as a Shāfi Khulit (neighbour by common tenancy or partner) and also by right of ordinary vicinage. The vicinage was admitted and the partnership denied by defendant, and the Court reserved the question whether the right (by vicinage?) might or might not be valid under the Hindoo Law current in Western India.

In the case at page 68 to which the above case is given by way of note, the parties again seem to have relied upon the Mahomedan Law, plaintiff alleging that he had given notice of his claim to the Kazee, and defendant pleading, *first*, that plaintiff had refused the bargain—*secondly*, omission to advance the claim within the period prescribed by law.

The Court remarked that, "the parties being "Hindoos, the dismissal on a technical point of "Mahomedan law was improper. *The right of "pre-emption was supported* not only by local "usage, but *by the Hindoo Law* as expounded "by the Pundits" (in the case last cited).

Now, it is clear enough that, if the parties were Hindoos, and the Court thought the right of pre-emption sanctioned by the Hindoo Law, the claim could not be defeated upon a rule taken from the Mahomedan Law upon the same subject.

The Court, however, went on to observe that, "upon the particular question of laches on the "part of plaintiffs," it "could find no neglect in "asserting their right, sufficient to bar their "claim;" so that in fact it was immaterial whether the point were decided under Mahomedan Law or not.

In another case reported in the same Volume, page 307, every thing turned upon the covenants executed between the parties, and it was remarked that, under the circumstances, the Mahomedan Law was irrelevant.

In the 6th volume, we find first at pp. 82 and 83 two cases from Shahabad, in which it is merely laid down that the practice of claiming right of pre-emption is current among Hindoos in the Province of Behar (although the right is *not* expressly recognized by Hindoo Law). In one of these cases both parties relied upon vicinage, and in both cases "legal preliminaries" or "conditions" are referred to as necessary.

A case at page 163 of the same Volume merely upholds the doctrine that Hindoos are to be admitted to the right of pre-emption as matter of custom. What the nature of that custom was, is not stated.

In the next case at page 277, there was no question of the right of pre-emption raised, the only point in dispute being the amount of purchase-money that was to be paid.

We think it cannot be said that these cases decide any thing as to the existence of a Hindoo custom of pre-emption not founded upon Mahomedan Law, or that they afford any ground for holding that the decision of 1843 was wrong.

There is then the precedent in 1 Sevestre's cases, page 27; but that is a case to which we find some difficulty in referring, as we do not understand on what principle it was decided. The appeal came from Beerbhoom which is a Bengal District. It

had been repeatedly held that a right of pre-emption was not recognized in Bengal, and the petitioner referred to neither Mahomedan Law nor custom. The application was to cancel the sale, made in execution of a decree, to the defendant of the female apartments of one Ashanund which were contiguous to those of the applicants, on the ground that, by such a sale, the petitioners would suffer serious inconvenience, and the females of their family incessant exposure.

The Court gave this final judgment :—

"Pre-emption is recognized by the Mahomedan Law. It is unknown to the Hindoo Law whereby vicinage does not confer any right to such claims; but by the practice of the Court a claim of the right of pre-emption arising from vicinage has been recognized to extend even to Hindoos in preference to claims advanced by strangers;" and it was ordered that the Zillah Judge should depute a Hindoo Moonsiff to enquire and report whether the sale complained of would be really opposed to the feelings, peculiar usages, and institutions of the natives, and that, if the Judge should be satisfied upon the Moonsiff's report that it would be so, he should cancel the sale and make over the premises to the applicants, on their paying the purchase-money with interest at 5 per cent.

This order appears to have been made upon general considerations of justice and equity.

We may now briefly refer to the cases in the North-Western Provinces Reports.

There is a case in 1849 (Reports p. 137) which the Court appears to have decided on somewhat narrow grounds. The plaintiff claiming a right of pre-emption under Mahomedan Law was a Mussulman; defendant was a Hindoo and objected to the application of Mahomedan Law; and the Court, without adverting to the question whether or not a right of pre-emption existed by usage, and what the nature of that usage was, held simply that, under the circumstances, the 9th Section of Regulation VII of 1832 was decisive and forbade the admission of *Huq Shoofâ*.

But in 1850, a broader view was taken. In this case Regulation VII of 1832 was again mooted, but the Court said—"In this case the only party who looses any thing is the defendant Jowahir Lall, and he is of the same persuasion with the plaintiffs." * * * "Still less can any objection be now taken by the defendant Mogul Beg, who is a Mahomedan. The right of pre-emption is of Mahomedan origin, but it has frequently been accepted by the Hindoos; and whereas, in the instance before the Court, no objection whatever is made to the applicability of the law which governed the decision, the Courts are not called upon, *proprio motu*, to refuse to administer that law to the Hindoos."

N. W. P. Reps. 1850, p. 21

In a case in 1852, the same Court quoted with approbation, and affirmed the Calcutta Sudder Court ruling of 1843.

N. W. P. Rep. 1852, p. 227

They did so again in 1856, at page 363 of the Reports for that year; and this brings us to the case relied on by our colleague Mr. Justice Campbell, to be found at page 393 of the same Volume.

What was actually decided in this case was that a Hindoo claimant could not on the mere ground of vicinage support a claim to pre-emption in respect of an entire estate. We think it pretty clear, however, that, even among Mahomedans, the Courts would not carry the right of pre-emption so far as this. The Court, indeed, observes that the grounds, upon which the Courts have based their recognition of the right of pre-emption among Hindoos, are, *first*, prescriptive usage and local custom, and *second*, the justice and propriety of the measure to prevent dissension by the introduction of strangers.

Now, this, we presume, is precisely the principle which must be at the bottom of the right to pre-emption by vicinage, when that right is restrained within reasonable limits; and it is because this principle is to a less degree concerned in cases of vicinage that the right by vicinage is regarded by the Mahomedan Law itself as weaker than the right by common tenancy.

We are not inclined to dissent from this ruling of the Agra Sudder Court. It in no respect impugns, on the contrary it again affirms, the Calcutta decision of 1843. Its effect is not to establish among Hindoos the existence of a separate law or custom of pre-emption distinct from that set forth in Mahomedan Law, but rather to qualify the application of that law, and to intimate that the Court will not admit that right among Hindoos in all cases possible among Mahomedans, but in cases of doubt will look to the nature of the asserted right or custom, and ascertain whether it be reasonable. And this appears to us a very proper view of the subject, and one consistent with most of the cases decided in the late Sudder Court of Calcutta.

We, therefore, think the established law upon this subject is clear enough—that a right or custom of pre-emption is recognized as prevailing among Hindoos in Behar and some other provinces of Western India; that, in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, where it exists, must be presumed to be founded on and co-extensive with the Mahomedan Law upon that subject, unless the contrary be shown; that the Court may, as between Hindoos, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan Law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan Law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record.

In this requirement we see no evil, inasmuch as a right of pre-emption undoubtedly tends to

restrict the free sale and purchase of property and it is desirable therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously

It may be noted as a significant fact that every term employed in connection with the right including the name of the right itself, *Shoofa*, is borrowed from the Arabic and that the special appellant's pleader himself a Hindoo could not when questioned by the Court, refer to any term of Hindoo origin connected with the subject

And in reference to this particular case we may add that no separate Hindoo custom was ever pleaded, nor was the applicability of Mahomedan Law ever disputed by the defendant until the point was orally taken up at the hearing of the special appeal

We consider that the view originally taken by Mr Justice Bayley was correct and that the case should be remitted to the Zillah authorities for a finding on the conditions

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The 3rd March 1864

Present

The Hon'ble C B Trevor, W Morgan, F B Kemp, L S Jackson and G Campbell, *Judges*

Time to present application for special appeal--Extension of.

Case No 2106 of 1863

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensing, dated the ... 1863

Baboo Kashinath Roy and others, *Petitioners*

versus

Mynoodeen Chowdhry and others, *Opposite party*

Mr R T Allan for Petitioner

The High Court has the power of extending the time for the presentation of an application for the admission of a special appeal (*Mr Justice Trevor dissentiente*)

Mr Justice Morgan — The Court are not unanimous, but the majority of the Court have arrived at the conclusion that the decision of the late Sudder Court which has been brought under review (reported at page 325 of the Decisions for 1860, dated 16th April), is wrong and that the mode of computing the time for bringing a special appeal is the same as the mode of computing the time for bringing a regular appeal The phrase used in Section 373 of the Code of Civil Procedure is "the period prescribed" The opinion of the majority of the Court is that those words mean something different from the words "limited period" or "specified period" which occur in Section 333, that the Legislature meant by those words to import into the Section relating to special appeals the whole of the qualifications, mode of extension, &c contained in the Section (333) relating to regular appeals, and that it is too narrow a view of the second Section to treat the words "prescribed period" as meaning no more than "limited period" or "specified period." They really mean the period limited and specified in the earlier Section together with the mode of computing that period, and of extending it under special circumstances as given in that Section

The opinion of the majority of the Court, therefore is that the construction contended for is correct

Mr Justice Trevor — I have only to make one remark, and that is that, in differing from my present learned colleagues, I adhere to the opinion expressed by the late Sudder Court in 1860

The 8th March 1864

Present

The Hon'ble Sir Barnes Peacock, Kt, *Chief Justice*, and the Hon'ble H V Bayley and F B Kemp, *Judges*

Trespasser (Occupation as, or cultivation by)

Case No 127 of 1862 under Act X of 1859

Special Appeal from a decision passed by Mr M Beaufort, Acting Judge of Purneah dated the 10th December 1861, reversing a decision of Baboo Radhanath Bose, Deputy Collector of that District, dated the 28th November 1859

Sheikh Peer Bux (one of the Defendants) *Appellant*,

versus

Sheikh Medhjan (Plaintiff) and Bakaoollah (remaining Defendant) *Respondents*

Moulvie Lootfool Ruhman for Appellant

None for Respondents

Occupation as a trespasser ... cultivation by ... confer no right under Act X of 1859 ... can be taken into account ... which the ... ryot ... years

In this case the respondent Medhjan was plaintiff in the Court below The suit was for the delivery of a pottah for 10 beegahs and 7 cottahs of land at the rent of 2 rupees and 8 annas for a term of ten years The plaintiff in his plaint, dated the 1st September 1859, and filed on the 6th of the same month, alleged that he held the lands in question under a pottah dated 23rd Pous 1231 Moolkee (corresponding with the 5th of January 1851) for a term of 5 years, "that although the term of the pottah "expired in 1266 yet he was in possession of the "jote land and held possession in 1266 by means "of cultivating the land" In his statement made before the Deputy Collector he alleged that he had been in possession 20 or 25 years as a jotedar

The defendant Peer Bux, in answer to the plaintiff's case, stated that the lands in question pertaining to the rent-free lands of Mingum Moodee were resumed by the zemindar in 1261 Moolkee, and were in his khas possession, that the defendant Bakaoollah was putneedar, and that before the putnee was granted to him and after the pottah had been granted to the plaint-

ill, *viz.* on the 4th Maugh 1861 Moolkee (corresponding with the 16th January 1854), upon the application of Peer Bux one of the defendants and Mangum Moodee, a permanent lease was granted to them by the zemindar at the rent of 3 rupees; that after the expiration of the plaintiff's temporary lease in 1266 Moolkee (corresponding with January 1859) the defendant, by virtue of the permanent lease granted to him, entered upon the lands and sowed them with paddy, and built houses thereon for dwelling purposes. The Deputy Collector dismissed the suit upon the ground that the plaintiff had not proved that he had been in possession 12 years, and also upon the ground that the plaintiff having taken a lease which expired in 1266, had no right to the lands after the lease had run out. The Officiating Judge of Purneah, Mr Morris Beaufort reversed the decision of the Deputy Collector and recorded his judgment in the following words "It appears to me established that 'the plaintiff has a right of occupancy from his 'tenancy for upwards of 12 years, and reversing 'the decision of the Deputy Collector, decree a "pottah at 2 rupees 8 annas for 10 years" This was a very unsatisfactory and careless mode of deciding the case considering that one matter in dispute between the parties was, whether plaintiff or defendant was in possession in 1267 Moolkee, and that the Judge was reversing a decision of the Deputy Collector upon a question of fact He ought to have found the facts in such a manner as to enable this Court to review his decision in the event of a special appeal upon a point of law It is important for us to know whether the 12 years' tenancy of which the Judge speaks was a tenancy ending in 1266 Moolkee, or whether he includes in those 10 years any portion of 1267 Moolkee The plaintiff states that he held over in 1267 The defendant states that, upon the expiration of the plaintiff's pottah in 1266, the defendant entered by virtue of the permanent lease granted to him If the plaintiff ceased to hold at the expiration of his lease in 1266 Moolkee, he ceased to hold before Act X of 1859 was passed. If he held over after the expiration of his lease up to the time of filing his plaint, he had possession up to the 6th September 1859, a date subsequent to the day fixed for its commencement by Section 176, for the Act received the assent of the Governor-General on the 29th of April 1859, and took effect from the 1st of August 1859 But even, if he held over after the expiration of the lease granted in 1261, he was a trespasser, and was consequently a trespasser when Act X of 1859 was passed, as well as when it came into operation, unless he held with the consent of the putneedar; or if a permanent lease was granted to the defendant Peer Bux, as alleged by him, unless Peer Bux also assented We think that an occupation as a trespasser or a cultivation by a trespasser could not confer a right under Act X of 1859 and that it could not be taken into account in considering whether the plaintiff had occupied as a ryot for 12 years.

The case must be remanded to the Judge who will instruct the first Court to determine whether the plaintiff continued to occupy or cultivate after the expiration of the lease granted to him in 1261. If so, whether he occupied with the consent of the putneedar and of the other defendant for either and which of them; and whether a permanent lease was granted to the defendant Peer Bux as alleged by him Upon the return of the finding we think that this case ought to go to a Full Bench for decision, as it may involve important questions for consideration as to the effect of Section 6 Act X of 1859.

The 16th March 1864

Present

The Hon'ble C. B Trevor, G. Loch, and H V Bayley, *Judges*.

Sale in execution of decree for rent —No appeal nor regular suit.

Case No 70 of 1863.

Special Appeal from a decision passed by Mr. J C Dodgson, Judge of Mymensingh, dated the 10th November 1862, reversing a decision of Moulvie Mahomed Nazim Khan Principal Sudder Ameen of that District, dated the 7th June 1862.

Ruttun Monee Dassee (Plaintiff) *Appellant*,

versus

Kaleekissen Chuckerbutty and others (Defendants) *Respondents*

Baboos Chunder Madhub Ghose and *Sreenauth Doss* for Appellant

Baboo Moteelall Mookerjee for Respondents

Section 151 Act X of 1859 bars a regular suit by a judgment-debtor to set aside a sale in execution of a decree for arrears of rent No appeal lies from an order of a Collector passed after decree and relating to the execution thereof

Justices Trevor and Loch —This case has been sent up to us for decision on account of a difference of opinion between Mr Justice Bayley and Mr. Justice E Jackson, before whom it was first heard. The question we are called upon to decide is, whether a tenant, whose tenure has been sold in execution of a decree for rent accruing on that tenure under the provisions of Section 105 Act X of 1859, can bring an action in the Civil Court to set aside that sale

After hearing the argument of the pleader for the appellent, we are of opinion that, under the provisions of Section 151 Act X of 1859, no suit can be instituted by a tenant to set aside the sale, by order of the Collector, of his tenure in execution of a decree for rent accruing thereon, and that the Collector's order in that respect is final Section 107 of the above Act expressly provides for the institution of a suit by a third party within one year from the date of the Collector's judgment rejecting the claim of such third party to the tenure; but no such remedy is provided for a defaulting tenant against whom a decree for rent

has been passed and whose tenure is sold for the rents accruing thereon in execution of such decree. The terms of Section 151 are express—that no order of a Collector after decree and relating to the execution thereof, shall be open to revision or appeal, otherwise than is expressly provided in the Act. By Section 160, an appeal from the judgment of a Collector in suits above 100 rupees is permitted, or in suits below that sum where any question of right, as set forth in Section 153, is at issue, but there is no appeal in respect of an order passed after decree and in execution thereof, nor can any suit be brought by the tenant to set aside the sale, for the law, as laid down in Section 151, declares that such orders are not open to revision. And this word "revision" does not refer to the powers conferred on Commissioners and the Board of Revenue by the latter part of Section 152, but to any revision by any other Judicial Court whether such revision be sought in the shape of a suit in a Civil Court or in any other way. Under this view of the law, we think that the suit of the plaintiff must be dismissed and we confirm the order of the Lower Court with cost.

Mr. Justice Bayley.—As I shall probably have gone on leave before the judgment of my colleagues will have been given in this case, I leave this note of my view after hearing argument of Counsel on the side opposed to my own opinion in that reference. I still think (in which view I believe my colleagues concur) that Section 151 Act X of 1859 bars a regular suit by a judgment debtor to set aside a sale held by a Collector under Act VIII of 1835, *i. e.* in execution of a decree for arrears of rent accruing on the tenure thus sold. I need hardly add more perhaps on this point than to say that the words of Section 151, taken in their legal meaning and construction, are such as not to admit of a regular suit. I may too here remark that I was wrong in apprehending that an appeal would lie to the Commissioner, the general controlling *Revenue* authority, for this is a *judicial* not an executive, matter. It is true that the result is that the Legislature has provided no remedy in cases of sales like this, should any irregularity occur, but it is for the Legislature to rectify its own omission and the subject might in that view be brought to its notice in the usual way.

The 17th March 1864.*

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice* and the Hon'ble Shumbhoonath Pundit, *Judge.*

Enhancement—Condition and rights of Ryots—Special Appeal.

Case No. 742 of 1863 under Act X of 1859.

Petition for review of judgment passed on the 2nd September 1863, by the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble Shumbhoonath Pundit, Judge, in Special Appeal No. 972 of 1863.

Isshur Ghose (Defendant) *Respondent, Petitioner,*

versus

Mr. James Hills (Plaintiff) *Appellant, Opposite party.*

Messrs. W. A. Montriou and R. T. Tavwah for Petitioner.

The condition and rights of ryots, whose tenure commenced since the Permanent Settlement, depend not on status but on contract and on laws made to regulate it specifically enacted. In 1793 the zemindars were declared to be the proprietors of the lands. From 1793 to 1812 they were prevented from granting pottahs or leases to ryots for more than 10 years and could not therefore have created ryots with hereditary rights of property in the soil. After Regulation V. 1812, they could grant leases at any rate and for any term. By the retrospective effect of Section 2 Regulation VIII of 1819, leases in perpetuity or for terms granted prior to 1812 were rendered valid.

In this case it was admitted that the value of the produce had increased otherwise than by the agency or at the expense of the ryot and that the notice required by Section 13 Act X of 1859 had been served before the end of the year preceding that for which enhancement was claimed. Upon being served with that notice the defendant had a right to quit according to Section 19. The Statute of Limitation does not give him a right of occupancy under Section 6 by holding for 12 years. But for Act X of 1859 therefore the defendant (assuming that he was not holding for a fixed term, and that his tenancy commenced since the Permanent Settlement) would have been liable to have his tenancy determined and to turn it out of possession if the order be not of ... and his landlord could not agree as to the rent to be paid for the future. But it being admitted that he had a right of occupancy under Act X of 1859 he was entitled to hold at a fair and equitable rate. What is fair and equitable depends on the value of the produce and cost of production.

After the Permanent Settlement and before Act X of 1859 a right of occupancy was not acquired by a ryot merely by holding or cultivating land for a period of 12 years. When that Act created the right, Section 5 declared that ryots having rights of occupancy should be entitled to hold at fair and equitable rates, thus leaving it to the Court to determine, in every case of dispute, what is a fair and equitable rate. To be fair and equitable, it must be so as regards both parties.

When there is no contract and the Statute of Limitation does not apply, the ryot cannot, by occupying and cultivating, become the proprietor of the soil, neither can he, by occupying with the consent of the zemindar and paying rent for the land to him, become entitled to the proprietorship of the soil, even though he should acquire a right of occupancy by virtue of Act X of 1859.

The objection that this Court on special appeal had decided a matter of fact in this case, was held not tenable inasmuch as the Judge below had found the facts specially, and his finding was in the nature of a special verdict. If therefore, in fixing the rent, he had improperly deducted certain items from the value of the gross produce of the land, this Court had the power on special appeal to disallow those items.

The Chief Justice.—This was an application for a review of the judgment delivered in the special appeal No. 972 of 1863, in a suit in which Mr. James Hills was the plaintiff and Isshur Ghose the defendant.

* Printed in continuation of Nos. 1607 of 1862 and 972 of 1863, on pp. 48 and 131 respectively.

The suit was brought to recover rent for the year 1268 B. S. at an enhanced rate, upon the ground that the value of the produce had increased otherwise than by the agency or at the expense of the ryot.

The rent formerly paid was at the rate of 5 annas 4 pie per beegah.

The plaintiff by a notice served before the expiration of the year 1267, claimed to enhance the rent to 1 rupee per beegah.

The case in the first instance was tried before the Native Deputy Collector, who awarded to the plaintiff the full amount claimed. The case was appealed to the Zillah Judge, who modified the decree of the Deputy Collector, and fixed the rent at 10 annas 8 pie a beegah.

Upon special appeal to this Court, the case was remanded upon the ground of an error in point of law, and upon the second trial the same learned Judge awarded 9 annas per beegah.

Upon appeal against the last mentioned decision, this Court, after a careful consideration of the case, and of the arguments which had been adduced in support of the appeal, considered that, according to the facts found by the Judge (in the nature of a special verdict), rupee 1-8 a beegah was a fair and equitable rent for the matan lands, and decided that the plaintiff was entitled to enhance the rent for those lands to the full amount claimed by his notice, *viz.* 1 rupee per beegah.

When the case was first argued upon appeal before this Court, the service of the notice to enhance was admitted, and it was also admitted that the defendant was a tenant having a right of occupancy. The only question that was then made, or which has been made before this Court from first to last until a review of judgment was applied for, was whether the amount fixed by the Lower Appellate Court was fair and equitable, and, if not, what was a fair and equitable rent.

Mr. Montriou, who appeared on behalf of the defendant, for the first time only upon the application for a review of judgment, commenced his argument by calling the attention of the Court to the statement of the defendant that he had paid rupees 5-4 per beegah for the last 30 years.

If that fact had been proved at the trial, the defendant, by virtue of the provisions of Section 4 Act X of 1859, would have been entitled to a presumption in his favor that the land had been held at that rent from the time of the Permanent Settlement, unless the contrary had been shown, or unless it had been proved that such rent was fixed at some later period; and if it had been found that the land had been held at a fixed rate of rent from the time of the Permanent Settlement, he would have been entitled under Section 3 of the Act to continue to hold at that rent, and no question could have arisen as to what was a fair and equitable rate.

No claim was ever set up on behalf of the defendant, in any stage of the proceedings, of a right to hold at a fixed rate of five annas four pie per beegah, upon the ground that he had held at that rate from the time of the Permanent Settlement.

When, in the course of argument, I asked the learned Counsel, Mr. Montriou, whether he now contended that the Court below ought upon the evidence to have found that the land had been held at a fixed rate from the time of the Permanent Settlement, he admitted that the defendant Isshur Ghose was not a mowurreree ryot; and he further stated that the defendant would rather not hold at a fixed rent.

The learned Counsel in an elaborate argument proceeded to consider what were the status and rights of a ryot before the Permanent Settlement, and what they were afterwards. But he failed to give any exact definition of such status and rights except that they were "Mámuli."

It is not necessary to consider what were the rights of the ancient hereditary ryots, or even of the ryots at the time of the Permanent Settlement, for it has not been found in this case that the holding of the defendant, or of those through whom he claims, commenced before the date of the Permanent Settlement. There was no finding of the Lower Court to that effect; and there was no appeal preferred upon the ground that there ought to have been such a finding. Indeed, even if the defendant's own statement be accepted, there is nothing to show that his holding commenced more than 30 years ago.

We were told that the just claims of the ryots were altogether overlooked and forgotten at the time of the Permanent Settlement, and I was referred by the learned Counsel, in the course of his argument, to a book published in Calcutta in 1832, which he put into my hands, and which I have since read, entitled "A Memoir on the Land Tenure and Principles of Taxation in Bengal, by a Civilian." But it is not because the ryots of that day may have had rights which were then overlooked, and which they may consequently have been unable to prove in modern times, that ryots whose holdings commenced since the date of the Permanent Settlement are to be held entitled to rights which never belonged to them, and to be put on a par with the ancient hereditary ryots.

The learned Counsel for the defendant laid it down as a familiar doctrine with Jurists, that Primitive Societies deal with status rather than with contract, and he referred to the authority of the well known Hon'ble and learned author of "Ancient Law." It appears to me however that the condition and rights of those ryots at least whose tenures commenced since the date of the Permanent Settlement, depend not upon status, but upon contract, and upon the Laws and Regulations which have been specifically enacted. The evils which the Permanent Settlement was intended to remedy are set forth in the 6th Article of the Proclamation of the 22nd March 1793 (*see* Regulation I of that year, Section 7), of which I will read the following short extract:—

"The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty

that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them or their heirs or successors for an augmentation of the public assessment in consequence of the improvement of their respective estates."

The benefits intended to be secured by the new system, and the necessity for depriving the Revenue authorities of their judicial powers, were pointed out in the preamble to Regulation II of 1793, which may be read with much advantage. It runs as follows:—

"In the British Territories in Bengal, the greater part of the materials required for the numerous and valuable manufactures, and most of the other principal articles of export, are the produce of the lands; it follows that the commerce, and consequently the wealth of the country, must increase in proportion to the extension of its agriculture. But it is not for commercial purposes alone that the encouragement of agriculture is essential to the welfare of these provinces. The Hindoos, who form the body of the people, are compelled, by the duties of their religion, to depend solely upon the produce of the lands for subsistence, and the generality of such of the lower orders of the natives as are not of that persuasion are, from habit or necessity, in a similar predicament. The extensive failure or destruction of the crops that occasionally arises from drought or inundation, is in consequence invariably followed by famine, the ravages of which are felt chiefly by the cultivators of the soil and the manufacturers, from whose labors the country derives both its subsistence and wealth. Experience having evinced that adequate supplies of grain are not obtainable from abroad in seasons of scarcity, the country must necessarily continue subject to these calamities, *until the proprietors and cultivators of the lands shall have the means of increasing the number of the reservoirs, embankments and other artificial works, by which to a great degree, the untimely cessation of the periodical rains may be provided against, and the lands protected from inundation*, and as a necessary consequence, the stock of grain in the country at large shall always be sufficient to supply those occasional but less extensive deficiencies in the annual produce, which may be expected to occur, notwithstanding the adoption of the above precautions to obviate them. *To effect these improvements in agriculture, which must necessarily be followed by the increase of every article of produce, has accordingly been one of the primary objects to which the attention of the British Administration has been directed in its arrangements for the internal Government of these provinces. As being the two fundamental measures essential to the attainment of it, the property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever. These measures have at once rendered it the interest of the proprietors to improve their estates, and given them the means of raising the funds necessary for that purpose.* The property in the soil was never before formally declared to be vested in the landholders, *nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of their tenures, without the previous sanction of Government.* With respect to the public demand upon each estate, it was liable to annual or frequent variation at the discretion of Government. The amount of it was fixed upon an estimate formed by the public officers of the aggregate of the rents payable by the ryots or tenants for each beegah of land in cultivation, of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the public, and the remainder the share of the landholder. Refusal to pay the sum required of him was followed by his removal from the management of his lands, and the public dues were either let in farm or collected by an officer of Government, and the above-mentioned share of the landholder, or such sum as special custom or the orders of Government might have fixed, was paid to him by the farmer or from the public treasury. *When the extension of cultivation was productive only of a heavier assessment, and even the possession of the property was uncertain, the hereditary landholder had little inducement to improve his estate, and monied men had no encouragement to embark their capital in the purchase or improvement of land, whilst not only the profit but the security for the capital itself was so precarious.* The same causes, therefore, which prevented the improvement of land, depreciated its value. Further measures, however, are essential to the attainment of the important object above stated. All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of Maal Adawlut or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure, whilst the Revenue Officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from the irregular, summary, and often *ex-parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, it is obvious that, if the Regulations for assessing and collecting the public revenue are infringed, the Revenue Officers themselves must be the aggressors, and that individuals who have been wronged by them in one capacity can never hope to obtain redress from them in another. *Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants. Other security, therefore, must be given to landed property and to the rights attached to it, before the desired improvements in*

agriculture can be expected to be effected. Government must divest itself of the power of infringing, in its executive capacity, the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. The Revenue Officers must be deprived of their judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of Courts of Judicature superintended by Judges who from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land and also between the latter and their tenants. The Collectors of the Revenue must not only be divested of the power of deciding upon their own acts but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorized to demand on behalf of the public, and for every deviation from the Regulations prescribed for the collection of it. *No power will then exist in the country by which the rights vested in the landholders by the Regulations can be infringed or the value of landed property affected. Land must, in consequence, become the most desirable of all property, and the industry of the people will be directed to those improvements in agriculture, which are as essential to their own welfare as to the prosperity of the State.*"

By Section 51 Regulation VIII of 1793, rules were prescribed to prevent undue exactions from the dependent talookdars.

By Section 54 all proprietors of lands were directed to revise, in concert with their ryots, the impositions upon the ryots under the denomination of abwab mathoot, and other appellations and to consolidate the whole with the assul into one specific sum, and by Section 55 no new abwabs were to be imposed.

The provisions of Sections 56, 57 and 60 of the same Regulation VIII of 1793 are also important. Section 56 says: "*It is expected that in time the proprietors of land and the ryots will find it for their mutual advantage to enter into agreements in every instance for a specific sum for a certain quantity of land, leaving it to the option of the latter to cultivate whatever species of produce may appear to them likely to yield the largest profit.* Where, however, it is the established custom to vary the pottah for lands, according to the articles produced thereon, and while the actual proprietors of land and ryots in such places shall prefer an adherence to this custom, the engagements entered into between them are to specify the quantity of land, species of produce, rate of rent, and amount thereof, with the term of the lease, and a stipulation that in the event of the species of produce being changed, *a new engagement shall be executed for the remaining term of the first lease or for a longer period if agreed on*, and in the event of any new species being cultivated, a new engagement with the like specification and clause is to be executed accordingly."

Section 57. "*First.*—The rents to be paid by the ryots by whatever rule or custom they may be regulated, shall be specifically stated in the pottah, which, in every possible case, shall contain the exact sum to be paid by them.

"*Second.*—In cases where the rate only can be specified, such as where the rents are adjusted upon a measurement of the lands after cultivation, or on a survey of the crop, or where they are made payable in kind, the rate and terms of payment and proportion of the crop to be delivered with every condition, shall be clearly specified."

Section 60. "*First.*—All leases to under-farmers and ryots *made previous to the conclusion of the settlement*, and not contrary to any Regulation, are to remain in force until the period of their expiration, unless proved to have been obtained by collusion, or from persons not authorized to grant them.

"*Second.*—*No actual proprietor of land or farmer or persons acting under their authority, shall cancel the pottahs of the khoodkasht ryots except upon proof that they have been obtained by collusion, or that the rents paid by them within the last three years have been reduced below the rate of the nirkbundy of the Pergunnah, or that they have obtained collusive deductions, or upon a general measurement of the Pergunnah for the purpose of equalizing and correcting the assessment.*"

By Section 2 Regulation XLIV of 1793 it was enacted as follows: "No zemindar, independent talookdar, or other actual proprietor of land, nor any persons on their behalf shall dispose of a dependant talook to be held at the same or at any jumma, or fix at any amount the jumma of an existing dependent talook for a term exceeding ten years, *nor let any lands in farm, nor grant pottahs to ryots or other persons for the cultivation of lands for a term exceeding ten years.* Nor shall it be lawful for any zemindar, independent talookdar, or other actual proprietor of land, who may have entered into an engagement with any dependant talookdar fixing the jumma of his talook for a term not exceeding ten years, *or let any lands in farm or grant pottahs for the cultivation of lands*, for a term not exceeding ten years, to renew such engagement, lease, or pottah at any period before the expiration of it, excepting in the last year, at any time during which it shall be lawful to the parties to renew such engagement, lease, or pottah, upon the same *or any other term* for a period not exceeding ten years, calculating from the expiration of the year in which such renewal may take place. All evasions of the prohibitions contained in this Section by entering into two separate engagements, leases, or pottahs at the same time, dating an engagement, lease, or pottah, subsequent to the period at which it may have been actually executed or by any other device, shall be considered as an infringement of them, and every engagement fixing the jumma of a dependant talookdar

and every lease or pottah which has been or may be concluded or granted in opposition to such prohibitions, is declared null and void."

I will read the recital of the Regulation, as it is important to show:—

1st—That one of the objects of the Legislature was to protect the zemindars and their heirs against improvident leases at low rents as well as to secure the Government Revenue.

2nd—That previously to the Decennial Settlements being declared permanent, proprietors of land were not entitled to enter into engagements with their under-farmers or ryots for a period extending beyond the term of their own engagements with the public.

The recital is as follows:—

"The public demand upon the estates of the proprietors of lands with whom a settlement has been or may be concluded under the original Regulations for the Decennial Settlement, having been declared fixed for ever, it is to be apprehended that many proprietors, either from improvidence, ignorance, or with a view to raise money, or from other causes or motives may be induced to dispose of dependent talooks *to be held at a reduced jumma* or fix the jumma of the dependent talooks now existing in their respective estates at a reduced rate, *or let lands in farm or grant pottahs for the cultivation of land at a reduced rent for a long term or in perpetuity, such management, if held valid, would leave it in the power of such improvident or ill-disposed proprietors to render their property of little or no value to their heirs*, promote vice and injustice, occasion a permanent diminution of the resources of Government arising from the lands in the event of the rent or revenue reserved by such proprietor being insufficient for the discharge of the amount of the public demand upon their estates, *or an abuse of the great and lasting benefit which has been conferred upon the landholders by the possession of their lands being secured to them in perpetuity at a fixed assessment*, and moreover, be repugnant to the ancient and established usages of the country, according to which the dues of Government from the lands (which consist of a certain proportion of the annual produce of every beegah of land demandable according to the local custom in money or kind, unless Government has transferred its right to such proportion to individuals for a term or in perpetuity, or fixed the public demand upon the whole estate of a proprietor of land leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public so long as he continues to discharge the latter) are unalienable without its express sanction. It is, at the same time, essential that proprietors of land should have a discretionary power to fix the revenue payable by their dependent talookdars *and to grant leases or fix the rents of their lands for a term sufficient to induce their dependent talookdars, under-farmers, and ryots, to extend and improve the cultivation of their lands*, and that such engagements should be held inviolable in all cases, except where they may interfere with or affect in any shape the primary and indefeasible rights of Government. *Upon the above grounds, and as the proprietors of land previous to the Decennial Settlement being declared perpetual, were not entitled to enter into any engagements with their dependent talookdars, under-farmers, or ryots, for a period extending beyond the term of their own engagements with the public*, the Governor General in Council has enacted as follows, &c."

It may be here remarked that Regulation XLIV of 1793 formed part of the general rules of the Perpetual Settlement of that year, and was passed on the same day as Regulations I, II, and VIII of the same Code, *viz.* on the 1st of May 1793.

The law continued in this state until Regulation V of 1812, when Section 2, Regulation XLIV of 1793 was repealed, and it was declared that proprietors of land paying revenue to Government were competent to grant leases for any period which they might deem most conducive to themselves and their tenants, and to the improvement of their estates. (Section 2.)

Section 3 enacted that "such parts of Regulation VIII. of 1793 and of Regulation IV. of 1794, as require that the proprietors of land shall prepare forms of pottahs, and that such forms shall be revised by the Collectors, and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded, *and the proprietors of land shall henceforward be considered competent to grant leases to their dependent talookdars, under-farmers, and ryots, and to receive corresponding engagements for the payment of rent from each of those classes or any other classes of tenants according to such form as the contracting parties may deem most convenient and most conducive to their respective interests; provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses, whether under the denomination of abwab, mathhoot, or any other denomination.* All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void, *but the Courts shall notwithstanding maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words enforce payment of such sums as may have been specifically agreed upon between them.*"

Sections 4 and 5 of that Regulation apply to purchasers at the public sales and persons attaching lands on behalf of Government, and not to ordinary cases between zemindars and persons claiming through them and their ryots.

The preamble of the Regulation, the latter part of Section 3, and the wording of Sections 6, 7, 8, 9, and 10, all show that these Sections must be read together, and that they were not intended to extend to any case except those in which there should be a public sale or attachment of the lands.

Section 2 Regulation V of 1812 was explained by Regulation XVIII of 1812.

By Regulation VIII of 1819, Section 2, it was declared that *any leases or agreements for the fixing of rents* then in existence, that had been granted or concluded for a term of years, or in perpetuity, by a proprietor under engagement with Government, *should be deemed good and valid tenures according to the terms of the covenants or engagements interchanged*, notwithstanding that the same might have been granted before the passing of Regulation V of 1812, and while the rule of Section 2 Regulation XIV of 1793, which limited the period for which it was lawful to grant such engagements to 10 years, was in full force and effect; provided that nothing therein contained should be held to exempt tenures held under engagements from proprietors of estates paying revenue to Government from the liability to be cancelled *on sale of the said* estates for arrears of the said revenue under the rule of Section V Regulation XLIV of 1793, unless specially exempted from such liability by the rule in question, or by any other specific rule of the Regulations in force.

It is clear from the above extracts which I have read from the Regulations:—

1*st*.—That the zemindars were, in 1793, declared to be the proprietors of the lands, and encouraged to exert themselves in the cultivation and improvement of their estates under the certainty that they would enjoy exclusively the fruits of their own good management and industry.

2*nd*.—That from 1793 to 1812 they were prevented from granting pottahs or leases to ryots for terms exceeding 10 years, and consequently could not during that period have created ryots with hereditary rights of property in the soil.

3*rd*.—That after Regulation V of 1812, they were entitled to grant leases to all new ryots and to all ryots who were not entitled to demand a renewal of their leases, such as khoodkhast ryots, at any rent and for any term that might specifically be agreed upon between them, and that such leases, whether in perpetuity or for any term, were binding upon the zemindars and their heirs or assigns, though not binding upon a purchaser under a sale for arrears of revenue, and that the Courts were to give effect to the definite clauses of the engagements, *and to enforce payment of the sums specifically agreed upon.*

4*th*.—That, by the retrospective effect of Section 2 Regulation VIII of 1819, leases in perpetuity or for terms granted prior to 1812, were rendered valid and binding. Consequently that zemindars had power, after Regulation V of 1812, to grant leases or pottahs to new ryots at whatever rent they might mutually agree upon, provided they did not impose indefinite or arbitrary cesses; and that, by the retrospective effect of Regulation V of 1812, all such leases granted between the date of the Permanent Settlement and the time of the passing of Regulation V of 1812, were rendered valid. If the defendant's original holding commenced after the date of the Permanent Settlement (and if it commenced before, it was for him to prove it either by positive or presumptive evidence), he was entitled to have effect given to any definite engagement between him and the landowner, either as to the duration of the term, if any was specifically granted to him, or as to the amount of rent to be paid, or the rates at which it was to be assessed. But he failed to prove that any such engagement was entered into, or that the term for which he was to hold was ever fixed or defined, or that any stipulation was made as to the rate of rent at which he was to hold He must be considered therefore to have entered and held as a tenant for one year only, and to have continued to hold on with the consent of the landowner from year to year, or according to the language more generally used in this country, as a tenant at will; and, but for Act X of 1859, he would have been liable to have his tenancy determined by the landowner, and to be turned out of possession, at the end of any agricultural year. It is unnecessary to determine whether, according to the law of this country, any notice to quit would have been necessary or not.

It was admitted that the defendant was entitled to a right of occupancy so long as he paid the rent payable for the land, and no evidence was given to show that he was entitled to any ancient right, or that he had occupied more than 30 years. The rent, therefore, not being fixed, was, by virtue of Section 5 of Act X of 1859, to be at a fair and equitable rate. By Section 17 of the same Act X of 1859, his rent could not be enhanced except upon one of the grounds mentioned therein, and as it was not shown by the plaintiff, the landowner, that the defendant held or cultivated under a written engagement, he would not have been liable to have his rent enhanced for the year 1268, unless a notice had been served upon him on or before the month of Chyte 1267, specifying the rent to which he would be subject for the ensuing year, and the ground upon which the enhancement was claimed.

As before observed, it was admitted that a ground for enhancement under Section 17 existed, namely, that the value of the produce had increased otherwise than by the agency or at the expense of the ryot; and it was further admitted that the notice required by Section 13 had been served before the expiration of the month of Chyte in the year preceding that for which the enhancement was claimed Upon being served with that notice, the defendant had a right to quit if he was not willing to hold at the enhanced rent demanded by the notice (*See* Act X of 1859 Section 19); and if he had done so, he would have been in no worse position than he would have been if he had not had a right of occupancy, and the plaintiff had determined his tenancy at the end of 1267, because they could not come to terms as to the rent to be paid. It was argued that the holding for 12 years would have given a right of occupancy even if Act X of 1859 had not been passed; and a case reported at page 778 of the Sudder Decisions for 1853 was cited as an authority in support of that position I

have examined that case, and, after full consideration, I cannot admit it as a binding authority. No reasons were given by the Judges who decided it, and in argument the right was based upon the Statute of Limitations. It is impossible to conceive how the Statute of Limitations could have created such a right. This is not my opinion only. In the case of Degumber Mitter and Ramsoonder Mitter (Sudder Decisions 1856, page 617), it was held, in accordance with numerous decisions of the Sudder Court, that the Law of Limitation did not prevent enhancement; that the claim to assess was a continually recurring cause of action, and that the possession of a tenant paying rent was not adverse to the landowner, but only permissive. A similar decision was come to in the case of Mussamut Lalahonissa Khatoon *versus* Ramgopul Sein (same Volume, page 665).

In the case of Maharajah Newalkisshore Singh *versus* Auchumbit Roy (Sudder Decisions for 1846, page 358), the plaintiff sued to recover possession of lands held by the defendants in excess of the quantity to which they were entitled under their pottah. But the defendants had held the land sought to be recovered for 18 years after the plaintiff's purchase at an auction-sale, and the Court held that the plaintiff was barred by the Statute of Limitations.

The case of Mirtunjoy Pauree and others *versus* Omeshchunder Paul Chowdry (Sudder Decisions for 1849, page 411), was a similar one. The defendants had held undisturbed possession of the lands sought to be recovered in excess of the quantity of land which they held under a pottah at a fixed rent, and it was held that the Statue of Limitations applied.

It must be remarked, however, that in these cases, if the land sought to be recovered was included in the defendant's lease, the lease would prevent the plaintiff from turning the defendant out of possession so long as it continued to exist. If the land was not included in the lease, and the defendant had not paid rent for it, the defendant held it, not under the lease, but adversely, and the plaintiff was barred by the Statute of Limitations in consequence of the adverse holding for more than 12 years.

Those cases are therefore no authority for the position that a tenant who holds land as a tenant under a lease, or as a tenant for an uncertain term, and pays rent for it for upwards of 12 years, gains a right by the Statute of Limitations to continue to hold the land after the expiration of the lease or the determination of the tenancy. In such a case he holds during the tenancy under a contract expressed or implied, and does not gain a title by an adverse holding. In the latter of the two cases above referred to, one of the Judges held that the Statute of Limitations was not a bar, because the defendant had been guilty of fraud; but the two who were in the majority held that no fraud had been set up or specifically specified.

In the case of Ramchunder Paul Chowdry *versus* Panchoo Mundul (Sudder Decisions 1856, page 953) the Law of Limitation was held not to apply, inasmuch as the defendant had not been in possession 12 years; but it was held that the defendant was proved by his pottah to be a Kudeemee ryot having a fixed right of occupancy. That case turned not upon the Statute of Limitations, but upon the construction of the particular lease which contained an express stipulation of renewal, for the ryot was expressly assured "that, on the expiration of the lease, the settlement for the same land would be renewed at the same rent" (page 958).

Some remarks were made by two of the Judges as to the defendant's right of hereditary occupancy, "that is," (the Judges say), "as we apprehend the right to occupy the land as khoodkhast ryots, or resident and hereditary cultivators having a presumptive right of occupancy, subject to the payment of such rents as may be legally imposed." What they said subsequently as to a khoodkhast ryot was merely an *obiter dictum*, and not binding as an authority.

It would surprise landowners in England, if they were told that tenants who held under leases for 99 years at a low rent, or had held for 20 years as tenants from year to year, had acquired rights of occupancy by the Statute of Limitations, and that, at the expiration of the leases, or upon the determination of the tenancies, they were not bound to quit, but were entitled to rights of occupancy to hold on at a lower rent than the landowners could obtain from new tenants.

Mr. Montriou in his argument contended that a ryot who acquires a right of occupancy by holding for 12 years under Section 6 Act X of 1859 is entitled to the same rights as a ryot who has occupied for 300 years. If so, a ryot who has held for thirty years (and the statement put forward on behalf of his client was that he had held for 30 years) cannot, by acquiring a right of occupancy by such holding, be entitled to any greater privilege, as regards the rent which is to be considered fair and equitable, than a ryot who has gained a right of occupancy by a holding for only twelve years. Indeed there is no assignable reason why a tenant, who gains a right of occupancy by holding for more than 12 years, ought to have a better or more valuable right than one who has gained a right of occupancy by having occupied only 12 years, unless the period of holding is sufficient to show that he was an ancient hereditary ryot whose title had its commencement before the Permanent Settlement. Length of holding coupled with other evidence, such as descent from ances[tor] to heir, may be presumptive evidence of an ancient hereditary tenancy which commenced before the Permanent Settlement, but unless the evidence is sufficient to prove an ancient right, there is no more virtue in a holding for thirty years than there is in a holding for thirteen.

But for Act X of 1859, the defendant (assuming that he was not holding for a fixed term, and that his tenancy commenced since the date

of the Permanent Settlement), would, in my opinion, have been liable to have his tenancy determined and to be turned out of possession at the end of 1267, if he and his landlord could not agree as to the rent to be paid for the future. But, it being admitted that he had a right of occupancy, he was entitled to hold at a fair and equitable rate.

Mr. Montriou contends that what is fair and equitable depends upon the status of the ryot and not upon the value of the produce and cost of production; that a ryot having a right of occupancy has a proprietary right in the soil, and that what might be fair and equitable as regards a ryot having capital, would not be fair and equitable as regards a ryot who is forced to borrow the necessary capital from a mahajun.

I cannot put such a construction upon the words "fair and equitable." If such were the intention I should have expected to find a fourth ground of enhancement in Section 17, namely, if a ryot who was forced to borrow the capital necessary for cultivating the land at the time when the tenancy was created and the rent fixed shall be proved to have acquired sufficient capital of his own to enable him to cultivate the land without borrowing from a mahajun.

These and all such enquiries as to the circumstances of the ryot would involve endless disputes and litigation, to say nothing of perjury, and the taking of the evidence in a suit to enhance the rent for a few beegahs of land, instead of occupying two months as in the present case, might possibly be extended to four.

I cannot imagine that any such injustice to the landowners could have been intended. At the time of the Permanent Settlement the Governor-General in Council, by Section 8 of Regulation II of 1793, reserved the right whenever he might deem it proper to enact such Regulations as he might think necessary for the protection and welfare of the ryots and other cultivators of the soil, or, to use the words of the Despatch of the Court of Directors, "such Regulations as might be necessary to prevent the ryots from being improperly disturbed in their possession or loaded with unwarrantable exactions" (Harington's Analysis of the Regulations, Volume 2, page 189). Whether Section 6, Act X of 1859 (which is worded much in the same manner as Section 19, Regulation VIII of 1793) was intended to apply to holdings which existed at the time of the passing of the Act and to such holdings only, or whether it was intended to apply to future as well as to past holdings, or to future holdings only, it is clear that it created a new right which was never before acquired by such a holding.

To hold that the Legislature intended to confer rights of occupancy which did not previously exist at rents lower than such as could be reasonably obtained from new ryots would be giving a construction to the Act which would render it an unjust interference with the vested rights of the landowners in the permanently settled districts, would considerably reduce the value of their property, and would defeat the promise which at the time of the Permanent Settlement was held out to them, that they would enjoy exclusively the fruits of their own good management and industry.

It can scarcely be imagined that the Legislature could have intended to confer by a twelve years' holding a right of occupancy against a zemindar at a lower rent than he could obtain from a new tenant, when they would not confer such a right against a purchaser claiming through the Government by reason of a purchase at a sale for arrears of revenue; and yet we find that a purchaser at a sale for arrears may annul a tenure created by a holding for 12 years, and may eject all under-tenants except such as existed at the time of the Permanent Settlement (see Act XI of 1859, Section 37).

I cannot think that it was the intention of the Legislature by Section 6 of Act X of 1859 to give to a ryot who obtained possession only 12 years ago, when he had no right to the land, and when the zemindar was not even bound to accept him as a ryot or to admit him into possession, any proprietary rights which would entitle him to participate beyond the period of his tenancy in any increase in the value of the produce of the land not caused by his own agency or at his expense.

Surely it could not have been necessary, in order to protect the ryot from unwarrantable exaction, to enact that a ryot who had no right in the land 12 years ago should by reason of his having occupied it for 12 years become entitled to hold it at a less rent than a new ryot would give for it.

The Minute of Lord Cornwallis, which was referred to by Mr. Montriou in his argument, contains the following remarks:—

"Neither is the *privilege which the ryots in many parts of Bengal enjoy*, of holding possession of the spots of land which they cultivate *so long as they pay the revenue assessed upon them*, by any means incompatible with the proprietary rights of the zemindars. *Whoever cultivates the land the zemindar can receive no more than the established rate, which in most places is fully equal to what the cultivator can afford to pay. To permit him to dispossess one cultivator for the sole purpose of giving the land to another would be vesting him with a power to commit a wanton act of oppression, from which he could derive no benefit.*" (Harington, Volume 2, page 184.)

In another part he says: "Neither is prohibiting the landholder to impose new abwabs, or taxes, on the lands in cultivation tantamount to saying to him *that he shall not raise the rents of his estate*." (Ibid.) It should be borne in mind that, when Lord Cornwallis spoke of established rates he was speaking before the Permanent Settlement, when it was in the power of the Government to raise the rates whenever a new settlement was made with the zemindars.

As bearing upon this point I will read a short extract from the Despatch of the Honorable Court of Directors, by which they expressed their concurrence in the sentiments of Lord

Cornwallis. It will be found in Harington's Analysis, Volume 2, pages 188-89. They there say: "The greatest obstacle to the execution of the intended system of permanency and certainty appeared to be the difficulty of providing for an equitable adjustment and collection of the rents payable by the ryots to the landholders. It might indeed be hoped that, under the proposed system, the latter would gradually learn from experience that their own interests are connected with the security and encouragement of the cultivators of the soil, *and that the time would come when the advantage of every class of the community would be best promoted by leaving to every one the care and management of his own property without restriction.* 'But (the Court adds) as so great a change in habits and situation can only be gradual, the interference of Government may, for a considerable period, be necessary to prevent the landholders from making use of their own permanent possession for the purpose of exaction and oppression.' We therefore wish to have it distinctly understood that, while we confirm to the landholders the possession of the districts which they now hold and subject only to the revenue now settled, and while we disclaim any interference with respect to the situation of the ryots, or sums paid by them, with any view to an addition of revenue to ourselves, we expressly reserve the right which clearly belongs to us, as Sovereigns, of interposing our authority in making, *from time to time, all such Regulations as may be necessary to prevent the ryots being improperly disturbed in their possession, or loaded with unwarrantable exactions.* A power exercised for the purposes we have mentioned, and which has no view to our interests, except as they are connected with the general industry and prosperity of the country, can be no object of jealousy to the landholders, and instead of diminishing, will ultimately enhance the value of their proprietary rights. Our interposition, where it is necessary, seems also to be clearly consistent with the practice of the Mogul Government, *under which it appeared to be a general maxim, that the immediate cultivator of the soil, duly paying his rent, should not be dispossessed of the land he occupied.* This necessarily supposes that there were some measures and limits by which the rent could be defined, and that it was not left to the arbitrary determination of the zemindar; for otherwise such a rule would be nugatory; *and in point of fact the original amount seems to have been annually ascertained and fixed by the act of the Sovereign.*"

This last remark is confirmed by Regulation XVI of 1769, cited by Mr. Montriou from 3 Colebrooke's Digest, page 174, for, in Section 3, page 176, the supervisors were directed to fix the amounts of what the zemindar receives from the ryot as his income or emoluments.

In my opinion, the intention of the Legislature (to use the words of Lord Cornwallis) was to prevent the zemindar from dispossessing one cultivator for the sole purpose of giving the land to another, and thereby committing a wanton act of oppression from which he could derive no benefit. It is not for me in this place to speak as to the policy of an enactment even to that extent. I am clearly of opinion that, after the Permanent Settlement, and before Act X of 1859, a right of occupancy was not acquired by a ryot merely by holding or cultivating land for a period of 12 years. If, when the right was created by the Act, it had been left to the arbitrary discretion of the zemindar to fix his own rent, he might have fixed it at any amount he pleased, and might thus have frustrated the intention of the Legislature to give a right of occupancy. But it was declared by Section 5 that ryots having rights of occupancy should be entitled to hold at "fair and equitable rates," thus leaving it to the Courts to determine in every case of dispute what is a fair and equitable rate. This, in my opinion, gave the ryots no greater right than would be created by a covenant in a lease to renew it at a fair and equitable rent. To be fair and equitable, it must be fair and equitable so far as both parties are concerned, not fair and equitable as regards the ryot, and unfair and inequitable as regards the proprietor of the land; and it would not be fair and equitable to a landowner to fix the rent at a lower rate than he could obtain from a new tenant, if he had not been deprived, by the Act of the Legislature, of his power of determining the tenancy and reletting the land to a new tenant. I find that a ryot who gains a right of occupancy by Section 6 is not precluded from determining the tenancy of another ryot to whom he may have sub-let, and who by an occupation of 12 years gains no right of occupancy against him, and may be compelled by his superior ryot either to pay him the full rent of the land or to quit it (*vide* latter part of Section 6).

I wish to remark, in order to prevent any misunderstanding, that this judgment is given upon the assumption that the defendant is not an ancient ryot having hereditary rights.

The rights of ryots who have held from the time of the Permanent Settlement at fixed rates are protected by Section 3 Act X of 1859; and the means of proving such holdings have been rendered more easy and within the power of those who are entitled to them by Section 4.

If there are any other ancient or hereditary rights to which a ryot is entitled, he is not precluded by Act X of 1859 from claiming and proving such rights in due course of law. But such rights cannot be assumed or admitted without proof either positive or presumptive. A ryot whose title had its origin at a date subsequent to the Permanent Settlement had not, in my opinion, a prescriptive or any right of occupancy beyond the term expressly or impliedly agreed upon between the landowner and him, merely because he had held for 12 years. Section 6 gives him the right whether the land be held under pottah or not. Is it to be supposed that the Legislature intended to give a right of occupancy to a ryot who held under a lease for 12 years which may have expired the day after Act

X passed, and to entitle him to hold at a less rent than a ryot who had held under a lease for 11 years which expired on the same day, neither of "such ryots having ever" been in possession before the commencement of their respective leases?

A ryot may have rights by contract or by prescription, or he may have rights by virtue of express enactment, and those rights may be enforced by law. The evidence which may be necessary to prove the existence of such rights must depend upon the facts of each particular case.

We have been in the habit of talking of "Pergunnah rates," and of rates paid for similar land in the neighbourhood, without much consideration. Are such rates always to remain stationary, or how are they to be increased, if, for instance, in consequence of a railway or canal, means should be provided for exporting the produce, and the value of the crops should be thereby doubled? Who is to be entitled to the benefit of the increased value as the pottahs granted in modern terms fall in, The landowner, or the ryot?

There is a great difference between the permanently settled districts and those in which the assessments upon the zemindars are from time to time renewed and altered, and where the rates payable by the ryots can, if necessary, be from time to time revised, and in which the zemindars, as declared by the preamble of Regulation XIV of 1793, cannot enter into engagements with their ryots for a period extending beyond the term of their own engagement with the Government.

I will add one word as to the argument of Mr Montriou, that the ryots were originally the owners of the soil, and that neither the Government nor the zemindars were the proprietors. This argument cannot apply to ryots who are in possession of land which has been occupied and brought into cultivation for the first time since the Permanent Settlement. It is clear that a ryot cannot at the present day, by merely entering upon land belonging to a zemindary, and bringing it into cultivation, become the proprietor of the soil. The zemindar may lose his right by the operation of the Statute of Limitations, and the right to the soil may thus be acquired by the ryot. But, in cases in which there is no contract, and to which the Statute of Limitations does not apply, the ryot cannot, by occupying and cultivating, become the proprietor of the soil. Neither can he, by occupying with the consent of the zemindar and paying rent for the land to him, become entitled to the proprietorship of the soil, even though he should acquire a right of occupancy by virtue of Act X of 1859.

It is clear that many of the documents to which Mr. Montriou referred show that the zemindars were then considerred the proprietors of the soil, and were taxed for the same in one sum for large tracts of land which were in the occupation of many ryots, and that they were not considered merely the Collectors of the Government dues separately assessed upon and due from the ryots.

In the Regulation of 16th August 1769, at page 174 of the 3rd Volume of Colebrooke's Digest, the supervisors were directed to fix the amount of what the zemindar receives from the ryots as his income or emolument. In the Regulation of 1791 Sections 63, 64, and 65, the word "rent" is actually used with reference to the payment made to the zemindar. It is clear also, from the Regulations of 1793, that from that date the sums paid by the ryots to the zemindars were considered as rent. It appears also from the Firman of the Emperor Alumgeer cited by Mr. Montriou, that the assessments were made upon the ryots by those who paid the revenue to Government, and that *pottahs* were granted by them to the ryots. It is not very material whether the sum assessed upon the ryots was at that time considered as rent or revenue. It is clear that the ryots at that time had to pay a much larger proportion of the gross produce or of the value of it than has been allowed in the present case, which is shown, by the judgment now sought to be reversed, to be less than one-sixteenth.

It was urged by Mr Montriou that the Court upon special appeal had decided a matter of fact. But this, in my opinion, was not the case. The Judges in the Mofussil are bound to give the reasons for their judgments, and in this case the Judge found the facts specially, which was the proper course for him to adopt. His finding was in the nature of a special verdict. Suppose he had taken into consideration in fixing the rent for 1268 B. S. that the defendant had incurred expenses in the marriage of his daughter, and in purchasing clothes, and had deducted those items from the value of gross produce of the land, we should certainly have had the power on special appeal to disallow those items.

Upon the whole, I see no reason to doubt the correctness of the judgment in the appeal, which was not given without much consideration, and I reject the application for a review. I will remark that in this case I do not wish to be understood as expressing an opinion as to whether Section 6 Act X of 1859 was intended to be retrospective or not. The case to which I referred in the latter part of the judgment delivered in October 1862, and in which I thought that the question would be settled, has since been remanded to determine certain questions of fact, with a direction that, when the facts shall have been decided, the case shall be heard before a Full Bench. In this case the right of occupancy was admitted, and it was not shown that the defendant was an ancient hereditary ryot, or that he had been a possessor for more than 30 years, at most a period long subsequent to the date of the Permanent Settlement.

Mr. Justice Shumbhoonauth Pundit.—The decision of the High Court of October 1862 remanding the case, having laid down certain rules by which "the fair and equitable rent" was to be found out for *mulhun* lands of certain kinds of ryots, and

after remand, the Lower Appellate Court having found on evidence the area which one ryot can cultivate by a couple of ploughs, the proportion of the area which yearly lies fallow, which quantity the Lower Court added to the preceding area, and having also found the average quantity of produce of these lands, the average value of the same, the cost of production, including hired labor, as well as the ryot's wages as a laborer, the amount of the profits of agricultural capital, the amount of the capital which the ryot is likely to employ in cultivation, and some other facts which the Lower Court was directed by the High Court to determine, and several others, decided the case according to these facts. The case was then appealed by the plaintiff, and taken up for trial, when I had the honor to sit with the Chief Justice. During the trial of the case, on behalf of the respondent, nothing was said against the order of the remand except that the ryot is entitled to a share of the profits of the increased value, and that too not directly against the order of the remand, but rather on the supposed strength of the order itself. Excepting two objections to be noticed shortly after, no complaint at that time was made in behalf of the ryot, to the effect that any other deduction which, under the order of remand, should have been made in his favor, has not been allowed, or that in spite of the directions in the order of remand, some other deductions than those allowed by the High Court should be granted.

The two items* claimed were such as could not at all be allowed, and are not now especially the subject matter of review. No objection in earnest was taken against the average of produce and the value of the produce as found and fixed by the Zillah Judge, and it was not pleaded before us that more lands lie fallow than the Lower Court has taken into account.

* See page 6 of the printed pamphlet.

The order of remand directed that, in order to find out "the fair and equitable rent," the whole of the produce is to be valued according to present rates; and after deducting from the amount so found costs and allowances therein mentioned, the balance would represent the total of the rent to be fixed. It had also been decided that the ryot in this case had no other right than that of occupancy, but this case was provided for in Sections 5 and 17 of Act X of 1859. Neither by the cross-appeal, nor by a formal application, was any review of the principles upon which the remand order was based asked by the respondent.

No complaint was made by the ryot that the facts have been found imperfectly, illegally, or against evidence. On the contrary, the value of the gross produce, as found by the Lower Appellate Court was expressly on both sides adopted as a true finding.

In such a state of things, I could not think myself competent to take up, as points of law, the principles of the order of remand, at least to the extent that they were objected to by the tenant, even if I had entertained doubts regarding the correctness of their application to the present case. As to the objections on facts, some that were urged were not allowed, and if others had been urged, they could not be entertained in a special appeal.

Plaintiff, appellant, having objected to certain allowances made by the Zillah Judge, on the ground that these were made against the principles of the order of remand, his objections were tried, and I thought proper to coincide with the Chief Justice in allowing to the ryot all the objected items except two, *viz.* the value of a house for the ryot to live in as a separate item, and the amount of an insurance for the risks of cultivation. I also agreed with the Chief Justice when virtually the price of the house was after all allowed, but only as a part of the wages of labor in addition to the money allowed by the Zillah Judge on that account. I also concurred with the Chief Justice in disallowing the insurance charge above-mentioned, because I thought that, when we had already allowed a very high rate of interest upon agricultural capital, this allowance on principle included insurance for all risks attending the undertaking, and thought that even if this risk be considered as not included in this high rate of interest, the average of produce was undoubtedly required to be fixed after making proper allowances for entire as well as partial failures.

To these opinions I still adhere. The argument of the learned Counsel for the petitioner, who technically asks for a review of the decision to which I was a party, were addressed virtually against the order of remand. I do not mean to say that the learned Counsel for the petitioner has not yet a right to attack the principles of that decision. I think, however, the Chief Justice alone can refuse or allow the present application for review. I do not feel myself legally authorised in review to pronounce any opinion upon the Judgment of a Full Bench of three Judges, all of whom are present in Court. I was asked to hear this review only because it was a review of the decision which was passed when I sat with the Chief Justice. By the last judgment only previous orders were carried out.

With reference to the question of onus, I see clearly that, under the wording of Section 5 Act X of 1859, plaintiff had to prove his case; but I do not see that, allowing this to be the right construction of the law, the learned Counsel for the petitioner has succeeded anywise in impugning the correctness or the validity of the last judgment, which was pronounced by mutual consent on facts found by the Judge on the whole of the evidence in the case.

Though in the last decision it was said, and properly too, that the Court was not bound to take a direct cognizance of the fact that the ryot *borrows his capital, and even his food,* yet practically a high rate of profit was allowed on the capital employed on cultivation, and not anywise less than the ryot had, according to the finding of the Court below, occasion to pay to his creditor.

As to the objection of the respondents that, in *drawing* the average of produce the produce of certain fields was improperly disallowed by the Zillah Judge, it is necessary to mention that by mutual consent the evidence taken in one case had been made applicable to all and the Lower Court was considered by the last decision of this Court to have acted right in proceeding upon evidence, and not upon personal observation

Allowing that even political economists in Europe do not strictly follow the rules adopted in the order of remand when in the determination of the amount or rate of rent customary rights not held by ordinary tenants intervene, it cannot be said that a decree of enhancement at the rate per beegah of one rupee in the place of five annas of the former rent was in any wise excessive, or that a decree for one rupee a rent out of more than six rupees of the value of gross produce of a beegah was unfair and inequitable to the ryot. Ryots mentioned in Section 5 Act X are not protected from enhancement by uniform payment of rent for 12 years, as the landholder may by a suit prove that the rents hitherto paid are below the prevailing rate payable by the same class of ryots for lands of a similar description and with similar advantages, or that the value of the produce or that the productive powers of the lands have been increased otherwise than by the agency or at the expense of the ryots

It may be allowed as argued by the learned Counsel for the petitioner that cultivators of neej and khamar land not held by ryots, as well as those cultivators who are under tenants of other ryots are persons distinct from ryots who cultivate *jotedaree* land. The latter may be allowed to hold, ordinarily lands which had not been either from before or at least at the time when they got their leases khamar lands or lands held as under tenants to other ryots. All ryots as distinguished from these cultivators of khamar lands or of koorfa and as tenants of ryots, may also be allowed to be of a distinct class, though as members of this class, some may as a sub division have higher, and some lower and different rights. It is, however, clear that ryots mentioned in Section 5 of Act X of 1859 are not Kudeemee ryots or ryots holding originally under any hereditary or transferable tenures, or holding through those who held it one time as such, and must have acquired the right of occupancy by being allowed to hold as a ryot for 12 years, a right which they did not possess in the 10th and 11th years of their possession. We may also allow to the petitioner, as argued by him, that zemindary lands are ordinarily, for purposes of leasing &c, divided into two sorts, ryottee and khamar, that what was ryottee might in course of time become khamar, and that what was once khamar may by an act of the landholder become ryottee lands

We may further allow that all such ryots in this country have been, according to custom allowed a share out of the profits of the lands cultivated by them beyond the mere wages of a hired laborer, and that zemindars, notwithstanding the Decennial Settlement, have not by law or custom that complete right over the lands and tenants which parties called proprietors enjoy in other countries. Making all these allowances, it has not been shown that the assessment fixed by the last decision of this Court is unfavorable to the tenant. When out of the three rupees of the former value of the gross produce of a beegah, five annas were received by the zemindar as his rent, the remainder included, along with the sum necessary for expenses all the profits which the ryots may have been entitled to claim as his share. Finding that it was not in any way probable, and was not pleaded or proved by the ryot, that the increase in the cost of production was higher than the proportionate increase of its value, so as to include the whole of the increased value, or also any portion of the former profits, I awarded eleven annas to the landlord out of three rupees of the increase of value of produce. When I did so, I had no ground to suspect that I was giving to the landlord any excessive rate of enhancement likely to cause misery to the ryot or any revolution in the country or that out of the remainder, after all necessary increased expenses some share of this increased value of production was not likely to be left to the tenant. I could never believe that the costs of production could ever have been so increased as to keep pace with the increase of value. I thought that if giving eleven annas, or even a little more out of three rupees representing the increase in value would not leave any *additional* profit to the ryot he cannot complain, as his former profit whatever they were, were not at all affected and that when by law the increase in value is made a ground of enhancement, even if a decree were given to the landlord for the whole of the increased value, minus the increased expenses, the ryot could not complain against the Court, as it was bound to administer the law. Nothing having been, therefore shown to impugn the correctness of the last decision, as far as I am concerned I reject the review

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The 31st March 1864

Present

The Hon'ble C Steer, F B Kemp, and L S Jackson, *Judges*

Plaint (not to be construed literally but according to the meaning of the plaintiff).

Case No 1763 of 1863

Special Appeal from a decision passed by Mr M. A G Shawe, Judge of Sylhet, dated the 16th March 1863, reversing a decision passed by the Assistant Commissioner of that District

Mrs Sophia Inglis (Plaintiff) *Appellant*,

versus

Ram Singh Rajah and other (Defendants) *Respondents*

The Advocate General and Mr R. T Allan for Appellant

Mr. G. A. C. Plowden and *Baboo Dwarkanauth Banerjee* for Respondents.

A plaintiff's suit should not be dismissed because, in describing his cause of action, strictly accurate language has not been used. A plaint should be construed literally, but according to the plaintiff's real meaning, unless such meaning is inconsistent with the words used in the plaint, so as to deceive the defendants and prejudice his defence.

Mr. Justice Steer.—This is a suit brought by Mrs. Inglis against the defendant for damages on the allegation, as the plaint says, that he in person, aided by others, plundered the produce of certain orange-groves which, under a written agreement, he was bound to deliver over to Mrs. Inglis.

In the literal sense of the word, there was no plunder; but what the plaint intended to charge against the defendant, amounted to this, that he, by intimidation and by other unlawful means, prevented the produce of the orange groves from reaching the plaintiff, and thus caused injury for which he is liable in damages. Though the first Court did at first, and before hearing the arguments of the pleaders, lay down the issue whether the defendant plundered the oranges, this issue was amended when the Court became better informed of the real state of the case in respect to the controversy between the parties. The amended issue was whether plaintiff sustained loss to the extent claimed by any act of defendant in breach of his agreement. On this question, the Court decided that there was evidence to show that the defendant sent down a large body of men to the orange groves, and by this act of intimidation and other acts prevented plaintiff from obtaining the whole of the produce of the groves in the year 1268. Taking the out-turn of 1267 as a basis for calculating the measure of the loss which plaintiff had sustained by the produce of 1268 not having been delivered when the Court awarded to her on that basis damages to the extent of Rupees 597-10-9, after allowing a set-off.

The defendant appealed to the Judge, but he did not complain that the first Court had taken a wrong view of the nature of the controversy, nor did he allege that he had been taken by surprise by the Judge laying down the amended issue, or that he had not been able, on that account, to produce the evidence which he might otherwise have been able to produce. He appealed on the ground that what he was charged with doing in the matter of the oranges he was bound to do, and that he was not liable in damages for any thing done by him.

The Judge, looking apparently to the literal words used in the plaint, and forgetting to see in what light the Court below him had regarded the matter in dispute, treated the case as one of plunder; and finding that there was no evidence of plunder, and that the basis of the calculation in measuring the amount of damages, *viz.* the average of the last year's produce, was not a fair one, reversed the judgment of the Lower Court and dismissed the plaintiff's suit with costs.

It is urged in special appeal that the Judge did not try the right issue, and that, in respect to the mode of measuring the damages, the out-turn of the year before was the only available mode, and that, taking that as the basis for calculating the plaintiff's damage, it was for the defendant, who was the wrong-doer, to afford proof that the basis assumed was not correct.

As already observed, the Judge, keeping the plaintiff to the literal words of his plaint, thought that she had failed to prove a case of plunder against the defendant, and thereupon dismissed the suit. But it seems clear to me, as it was clear to the Court of first instance, that the plaintiff never intended to charge it against the defendant that he with his own hands picked, gathered, and carried off the produce of extensive groves of oranges for several days in succession. If that was her case, the thing was physically impossible, and she was rightly made to suffer by the dismissal of such a preposterous charge. But what she intended, and what the defendant plainly understood, was that he had acted in such a way as to interfere with the plaintiff in the enjoyment of her accustomed rights, and had thus rendered himself amenable to damages. If the very words of the plaint do not allow of any such liberal interpretation, it is clear that the Court of first instance was satisfied from the way the case was laid before it and argued by the pleaders on either side, that plunder, in its literal sense, was not the charge intended to be preferred. But, after all, what great distinction is there between a person saying you have plundered my property, and saying the property was mine and you stopped it from reaching me In the one case, it is plunder direct; and in the other, it is plunder indirect It is not to the literal words used in the pleadings that the Courts are to look, but to their substance; and it is not because an act charged is inaccurately described as plunder, that the party injured by the act is to be deprived of redress. It is a different thing where a party sues for rent, say on a kuboolent, and fails to prove that the kuboolent was given. Here the very foundation of his action is the kuboolent; and if he has stated falsely that the kuboolent was given when it was in fact not given, he is rightly held to be disentitled to any rent, even if he succeeds in clearly proving that some rent is due to him. In the same way, where a party sues on the ground of adoption, he is not allowed to succeed if he fails to prove his adoption, but does prove that he is entitled in right of inheritance. The principle in these cases is clear and obvious; parties must not set up one case and prove another. But in the suit of the present plaintiff, her allegations and her proofs are the same, and there is no inconsistency between them. From first to last, the plaintiff's allegations have been that the defendant was bound to deliver the produce of the orange-groves to her; that he stopped the produce from reaching her, and appropriated the produce himself. The evidence adduced was with a view to prove this; and though the affair is called a plunder, neither side are at all in the dark as to the meaning attached to this word. To hold then in this case that the plaintiff's suit ought to be dismissed because, in assigning a technical

word to a wrong done, she has not used a strictly correct word, that, I say, would be to decide on a wrong principle, for plaints are not to be construed literally, but according to what the plaintiffs really mean, and unless such meaning is utterly inconsistent with the words used in the plaint, so as to deceive the defendant and prejudice his defence, the plaint is not to be dismissed.

If then the case is not one of plunder, but a case in which the defendant is charged with an act or acts in opposition to his agreement whereby the plaintiff was hindered from receiving, as was her accustomed right, the produce of the orange groves, the right issue, though tried in the first Court, has not been tried in the second, and this omission is a defect in law in the investigation producing a defect in the decision on the merits, which requires that the suit should be remanded in order that the right issue may be laid down and tried. That issue is, as the first Court stated it, *viz.* "whether plaintiff sustained loss to the extent claimed by any act of defendant in breach of his agreement."

If this issue is decided for the plaintiff, it will be necessary to consider the question of damages. On this point, the Judge's views, as expressed in his judgment now under consideration, are altogether erroneous. In all cases of this sort, the produce withheld can only be given by estimate. The out-turn of a crop in the past year is a very fair basis to estimate the crop of this year; and if it is too high, it is for the defendant, supposing that his conduct has been such as to render him liable to damages as a wrong-doer, to show what the plaintiff's actual loss has been. I think it necessary for the ends of justice, and to shorten litigation, to make the remarks in this paragraph, as if the Judge is not set right, he may repeat his former error and to give ground for another special appeal.

The case is accordingly remanded to be re-tried.

Mr. Justice Kemp.—The plaintiff, in her capacity of Executrix of the late Mr. H. Inglis, sued Ram Singh Rajah, Bursingh styled "the young Rajah," and others their dependants, to recover the sum of 597-10-9, being the price of 10,94,490 oranges which she alleged the defendants had *plundered* from the Byrang Poonjee orange grove, the said grove being held on a farming lease granted to the late Mr. H. Inglis by a former Rajah of Cherra Poonjee, Sooba Singh. The plaint, after reciting the date and terms of the lease, proceeds to aver that the plaintiff was in the undisturbed enjoyment of the produce of the orange grove up to the 3rd Kartick 1268 B. S.; that from the 4th of Kartick up to the 6th of Agran 1268, the young Rajah Bursingh *in person* and others, dependants, *plundered* and carried off the fruit from the aforesaid grove.

The Rajah Ram Singh alone appeared, and answered briefly to the following effect, that the Byrang Poonjee orange grove is in British territory, and that the lease granted by the late Rajah is inoperative; that, after the attachment of the grove by the Government, it was placed in the charge of the defendant, and he was commnaded to protect the growers of the fruit and to see that they were not oppressed; that, as the growers of the fruit were unwilling to give the produce of the grove to the plaintiff, the Rajah in pursuance of the orders of Government protected the growers who were thus able to enjoy the fruits of their labour; that, with the exception of doing his duty in protecting the weak against the strong, he had not on his own account taken a single orange; that he cannot be held liable; further, that the produce of the season was not of the extent stated by the plaintiff; that, so far from the defendant having plundered the grove, Colonel Guthrie on behalf of the plaintiff had plundered some oranges.

The plaintiff, in a written statement filed on the 3rd December 1862, repeats the allegation of her plaint that the oranges were *plundered*, and adds that they were sent to Calcutta.

The Assistant Commissioner laid down the following issues for trial:—

OF LAW.

Whether the lease given by the late Sooba Singh Rajah of the Byrang orange-groves to the late Mr. H. Inglis, was binding on the heirs of the former after Byrang was found to be British territory.

OF FACT.

Whether the defendants plundered oranges in the Byrang groves leased to the late Mr. H. Inglis.

Whether the yield of the oranges in the Byrang groves in 1861-62 was equal to that of the year 1860-61.

The Assistant Commissioner's decision on the issue of law was in favor of the plaintiff. It is unnecessary to enter upon this subject, as the law issue has been abandoned by the plaintiff's learned Counsel and pleaders in special appeal.

On the issue of fact, the Assistant Commissioner, without amending the issue as laid down by him in the first instance, observes in his judgment that the point for *consideration* is "whether the plaintiff sustained loss to the extent claimed by any act of the defendants in a breach of the lease contract." On this point, the Assistant Commissioner remarks as follows:—"It has been shewn from the papers of *another case*, that Rajah Ram Singh of Cherra Poonjee sent down a large body of men to the Byrang orange groves, and by this act of *intimidation* and other acts *prevented* plaintiff from obtaining the whole of the produce of the groves during the season of 1268 B. S."

The loss of the plaintiff, after allowing for a set-off the amount of which is not fixed, was estimated at the sum sued for, and a decree was passed against Rajah Ram Singh. The Rajah appealed. The Judge of Sylhet, Mr. M. Shawe, decreed the appeal and reversed the decision of the Court of first instance.

The Judge raised the following issue:—

"Has the number of oranges, as averred by the plaintiff, belonging to her, been *proved* to have been *plundered* by the defendants, or has the defendant's plea been established."

On this issue of *fact*, the Judge observes that the "only points to be determined are whether the number of oranges as estimated by the plaintiff was *bonâ fide* produced in the year in question, and whether the defendants really plundered the same." The Judge's own words are quoted.

In regard to the allegation of plunder, the Judge held that "the plaintiff's claim was *not proved*." The Judge further remarks that "it has not been *proved* that the defendants *forcibly plundered* the oranges as alleged, and that it appeared that the plaintiff lodged a complaint against the defendants for a breach of the peace and for taking away the oranges, but the charge was not proved, and no recognizances were taken from the defendants as solicited. The plaintiff's claim and assertions are not proved." I again quote the Judge's own words.

In special appeal, it is urged—

1*st*. That the Judge has omitted to consider the effect of the lease or the liability of the defendants in reference thereto.

2*nd*. That the Judge has disposed of the plaintiff's claim as if the action had been one on trespass of a wrong committed by the defendant Rajah Ram Singh, the fact of which had not been established; whereas he ought to have tried the case, as the first Court had tried it, as a suit for damages arising out of a breach of contract for which the defendant Rajah Ram Singh was liable under the terms of the said ijara.

3*rd*. The first Court having found that, owing to the acts of the defendant Rajah Ram Singh, the plaintiff was prevented from obtaining the produce of 1268 B. S., the Judge was bound to determine whether such was the case or not; instead of which the Judge has limited his enquiry simply to the question whether the defendant Rajah Ram Singh had committed the overt act of plunder or not of the oranges alleged to have been lost to the plaintiff through the acts of the defendant.

The appeal to this Court ends with a prayer for a remand in order that the Judge may try what the plaintiff considers to be the proper issue, *viz.* the "*quantum* of damages to be awarded to the plaintiff, the special appellant."

The learned Counsel and pleader for the special appellant decline to argue the first point taken in appeal. They contend that the question of the validity of the lease does not arise in this suit. On the issue of fact, their contention appears to me to be that the Judge should have tried the appeal to him on the same point as that which the Court of first instance chose to consider to be "the point for consideration," wholly irrespective of the issue originally laid down, and on which the parties went to trial—in short that a plaintiff, who comes into Court with a verified plaint embodying in distinct and unambiguous terms a charge which under the Penal Code might possibly amount to dacoity, may be permitted, on his failure to prove his charge, to fall back upon a fresh and totally distinct issue. I am clearly of opinion that the Judge has tried the right issue of fact, and indeed the only issue arising out of the statements of the plaintiff. It is a wholesome rule and particularly so in this country, that a plaintiff must prove his case as put forward in *his* plaint or written statement. In this suit, the plaintiff, both in her plaint and in her written statement, charged the defendants with plunder. Nothing could be more definite and clear than the terms used in the plaint. Further, I find that she examined several witnesses to prove the charge of plunder. The defendant also examined witnesses to prove his counter-charge of plunder brought against Colonel Guthrie.

The Court of first instance raised the proper issue of fact, *viz.* "whether the act of plunder as charged had been proved or not," and that simple issue ought to have been tried. There appears to me to be no inadvertence or mistake in the plaint, nor is there any variance between the allegations in the plaint and the written statement. There were, therefore, no good grounds for any amendment of the issue as originally framed, nor does the amendment appear to have been legally and formally made. "* If parties will attempt to support perhaps a good case by false statements and serious charges, they are justly punished if their suits are dismissed and are entitled to no consideration."

*Vide decision of a Divisional Bench of this Court, dated 12th August 1862. Nurrohuree Mohunt, Appellant, *versus* Narainee Dassee, Respondent.

The Judge has found that the plaintiff has failed to prove the charge of plunder which is the charge originally laid in the plaint, and further that the demand and assertions of the plaintiff are not proved. That is a finding upon facts, and one with which this Court cannot interfere in special appeal I would dismiss this appeal with costs and interest payable by the appellant.

Mr. Justice Jackson.—I concur generally with Mr. Justice Steer.

We must look, I think, to the substance and not to the form of cases set up in our Courts, and it would not be in accordance with justice to tie the plaintiff down by the literal interpretation of a particular word employed in his plaint, when that interpretation is at variance with probabilities, and with attendant circumstances.

The word "loot" no doubt means plunder primarily, but it was not at all likely that the plaintiff meant it to be believed that the Rajah in person had personally gone and plucked the fruit of the orange groves, and carried it off with his own hands. She clearly meant to impute to the defendants violent and unlawful interference with her enjoyment of certain rights secured to her by contract, whereby she had suffered loss.

That the defendant understood what was really meant is clear from the answer put in, which in some measure admitting such interference justified and defended it upon grounds there stated.

The Court of first instance, misled by the word used in the plaint, made the issue one of plunder; but in recording judgment, he states the real question as the "point for determination," by which virtually he means an amended issue.

This was in accordance with the statements put in and the evidence offered, and was not, therefore, a surprise to the defendant.

The Judge, on the other hand, instead of taking the broad and, as I think, the reasonable view of the case, narrowed it again to a question of plunder.

In doing so, I am of opinion that he erred; and I, therefore, concur in the order of remand.

The 2nd April 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges.*

Mesne Profits—Limitation.

Cases Nos. 397 and 402 of 1860.

Regular Appeals from a decision passed by Moonshee Nazeeroodden Mahomed, Principal Sudder Ameen of Dacca, dated the 22nd September 1860.

No. 397.

Unnoda Gobind Chowdhry and others (Defendants) *Appellants,*

versus

Ranee Surnomoye (Plaintiff) and others (Defendants) *Respondents.*

Baboos Dwarkanauth Mitter and *Gopeenath Mookerjee* for Appellants.

Baboos Sreenath Doss and *Ashootosh Dhur* and *Moonshee Ameer Ali* for Respondents.

No. 402.

Obhoy Gobind Chowdhry (Defendant) *Appellant,*

versus

Ranee Surnomoye (Plaintiff) and others (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Appellant.

Baboos Sreenath Doss and *Ashootosh Dhur* and *Moonshee Ameer Ali* for Respondents.

In a suit for mesne profits, under Section 14 Regulation III. 1793, the plaintiff is entitled to wasilat for 12 years before suit, excluding from such computation the period of pendency of the suit for possession from the date of the plaint till the final decree (Steer and Kemp, J J., *dissentientibus*).

Both under Clause 16 Section 1 Act XIV of 1859 and under Section 14 Regulation III. 1793, a separate cause of action in respect of the wrongful receipt by a defendant of rent or profits of land belonging to a plaintiff, arises immediately upon the receipt by the defendant of each several sum.

The Chief Justice and Justices Norman and Seton-Karr.—This was a suit instituted on the 21*st* of July 1858, for the mesne profits of 6,025 beegahs of land of which the plaintiffs recovered possession by a decree dated the 13th July 1855. The Lower Court awarded to the plaintiffs mesne profits from the 18th of July 1841 till the 10th of April 1856, the date when the plaintiff recovered possession, being 14 years 8 months and 26 days. The suit for possession was instituted on the 19th November 1852.

The question on appeal is whether the plaintiff's claim is barred to any and to what extent by the Regulation of Limitation, III of 1793, Section 14. The answer would be comparatively free from difficulty, were it not necessary to consider first what is the effect of certain decisions of the Sudder Court which are supposed to have put a construction upon the Regulation in question.

The first of these is Gooroo Pershad Poteedar *versus* Kommlakant Bose, 6 Select Reports, page 52. The plaintiff obtained a decree for possession on the 10th of September 1816, and commenced his suit for mesne profits on the 8th December 1828 (more than 12 years after the decree for possession) in which he obtained judgment for mesne profits from 1808. The ground on which the effect of the Regulation was said to be avoided was that the suit for mesne profits was brought within 12 years from the time when the plaintiff obtained possession under the decree. The same point was assigned as a reason for the decision in Rajah Anundnath Roy *versus* Dwarkanauth Tagore, S. D. A. Rep. 1847, page 857, in which the plaintiff was allowed to recover mesne profits for a period of 27 years before suit.

The ground taken by the Court in these cases may be dealt with at once by the observation that actual re-entry is no part of the cause of action in a suit for wasilat, and a plaintiff cannot create rights by his own laches against a defendant.

Azrawil Singh *versus* Balgobind Singh, 8th September 1853, S. D. A. Rep. page 8[illegible], was a suit instituted on the 28th of May 1850 for wasilat from 1819 to 1835. The plaintiff appears to have obtained a decree for possession on the 9th of August 1831, under which he got possession in 1837. The decree was affirmed by the Sudder Court on the 8th of April 1859. The suit was dismissed by the Principal Sudder Ameen, but the Court held that the *cause of action for wasilat must be considered to have arisen when all litigation regarding the right to the lands finally ceased.* The suit was, in fact, instituted 14 years after the latest date to which wasilat was claimed, and more than 12 years after the plaintiff got actual possession of the land.

In the marginal note it is said that the "Court held that the period during which litigation was protracted in appeal by the defendants, should be deducted."

Mahomed Hossein *versus* Mussamut Woozeerun, 23rd September 1853, S. D. A. Rep. page 849, is to the same effect.

In Dad Ali Khan *versus* Mussamut Woozeerun, 23rd September 1853, S. D. A. Rep. page 851, the suit was brought on the 14th February 1851 for wasilat from 1826 to 1841. The Principal Sudder Ameen awarded wasilat for the two years 1840 and 1841 as being within 12 years before suit; but this decision was reversed, and the full amount awarded by the Sudder Court

In Bachoo Chowdhry *versus* Ramnarain Singh, S. D. A. Rep. 1854, page 310, it was held that, though the defendants did not appeal, the suit for wasilat was within time, if brought within 12 years of the final decision of an appeal by other defendants.

In Ranee Surnomoye *versus* Protab Chunder Burooah, S. D. A. Rep. 1858, page 513, it is said, "the original of the suit for mesne profits dates from the final decision in the previous suit." The Court held a suit instituted in March 1851, for mesne profits for 1813, not barred by limitation.

In Khettur Monee Dossee *versus* Goopee Mohun Roy, 21st August 1862, Hay's Reports, page 178, a suit instituted in February 1861 for wasilat from 1817, the date of judgment in the suit for possession was 1832. The Court said that, had the suit been instituted at any time prior to 1844, the plaintiff would have been entitled to wasilat from 1820 to 1832.

In considering these cases, we observe that, in all except the last cited, the Court seems to consider the right to wasilat after recovery of judgment in an action for possession, as an entire indivisible right; so that, if the suit is brought within 12 years from the date of the final judgment, or the latest period of the defendant's possession of the land, the plaintiff is entitled to recover wasilat from the date of his dispossession, though such dispossession may have taken place 20 or 30 years before suit. We think, however, that it is clear that a separate cause of action in respect of the wrongful receipt by the defendant of rent or profits of the land belonging to the plaintiff arises immediately upon the receipt by the defendant of each several sum. The question in this respect would appear to be the same under Act XIV of 1859, Section 1, Clause 16, as it is under Regulation III of 1793, Section 14.

If the original suit had been for possession and wasilat, the defendant would have been at liberty to plead Limitation as to wasilat received beyond 12 years; and it does not follow that an acknowledgment of title, or other answer to the plea of Limitation to the suit for possession, would be an answer to such plea. We think that the plaintiff cannot enlarge his rights against the defendant, or deprive him of this plea by suing for wasilat in a separate action.

If the suit is for possession and wasilat, the enquiry as to wasilat ordinarily takes place in the execution of the decree. If the claim for wasilat form the subject of a separate suit under Section 10 Act VIII of 1859, or under the Circular Order of the 15th of June 1849, as a general rule such suit cannot be conveniently or properly tried until after the question of title has been determined in the suit for possession. Looking at the language of Section 14 of Regulation III of 1793, and the construction put upon it in Troup *versus* The East India Company, 7 Moore's Indian Appeals, pages 104—125; Rajah Enayet Hossein *versus* Syed Ahmed Reza, 7 Moore's Indian Appeals, pages 238—253; Prannath Roy Chowdry *versus* Rookea Begum, 7 Moore's Indian Appeals, pages 323—356; and Doorga Pershad Roy Chowdry *versus* Tara Pershad Roy Chowdry, 8 Moore's Indian Appeals, page 38, in counting the period of Limitation, it seems not unreasonable to exclude the period of the pendency of a suit for possession, during which, whether the claim for wasilat is being litigated in the same or another suit, the plaintiff's hands are stayed, and he is practically "precluded" from taking active steps for obtaining the remedy he seeks in the suit for wasilat. This is in accordance with the suggestion in the marginal note of Azrawil Singh *versus* Balgobind Singh. To lay down this doctrine is to treat the question whether the plaintiff proceeds under the Circular Order of June 15th, 1849, as a mere question of form. It puts the plaintiff only in the same position, as if he had included the claim for possession and wasilat in one action, but secures the defendant from being deprived of any right the Regulation would give him in respect of any delay subsequent to judgment in the suit for possession.

It is impossible to accede to the reasoning in the earlier cases in the Sudder Court, or to treat the present case as one in which the principles "*cursus curiæ lex curiæ*" or "*communis error facit jus*" apply. The late Sudder Court and this Court in the two later cases shrunk from the consequences of the doctrine supposed to be established by the previous cases.

In the case of Ranee Surnomoye *versus* Pertab Chunder Burooah, the Sudder Court attempted to escape these consequences by holding that "the period from which mesne profits should be granted must be determined by the nature of the possession of the opposite party, whether it be a *bonâ fide* possession or not, i. e. a possession without knowledge on the part of the possessor of the defect of his own title; so long as a party has a *bonâ fide* possession of land in the sense above given, he is not liable to the legitimate owner for mesne profits; immediately, however, he has notice of the defect of his title, &c., he ceases to be a *bonâ fide* possessor." The case of Khettur Monee Dossee *versus* Gopee Mohun Roy is an attempt to create a sort of double plea of Limitation, for which there is no warrant under the Regulation of Limitation or otherwise.

We, therefore, in this case which arises under Regulation III of 1793, think we are at liberty to hold that the plaintiff is entitled to wasilat for 12 years before suit, excluding from such computation the period of the pendency of the suit for possession from the date of the plaint till the final decree.

We may observe that Act XIV of 1859, Section 1, Clause 16, does not contain the exceptions which are found in Regulation III of 1793, Section 14, and therefore that it will be prudent for plaintiffs in future to include any claim for wasilat in the suits for possession.

According to the above ruling, the plaintiff will be entitled to wasilat from the 20th of October 1843 to the 10th of April 1856. The decree of the Court below must be modified ac-

cordingly, and each party will recover costs in the Court below, in proportion to the amounts recovered and disallowed respectively, and also costs in this Court in the like proportions.

Mr. Justice Steer.—The decision of the Lower Court being allowedly in conformity with the invariable principle of the late Sudder Decisions in cases where the same question has arisen, and the present case being likely to be the last one, or among the last, in which the propriety of the principle, as established by the Sudder Court, can be called in question (for the new Law of Limitation and the new Procedure Code have introduced a new rule and practice, rendering obsolete the old Decisions of the Sudder), I would not alter at the twelvth hour the principle of the old Sudder, which principle has become, from long observance, universally known, and according to which parties have been entirely guided in the institution of their suits. I would, under this view, allow the judgment to stand.

Mr. Justice Kemp.—A claim for the recovery of the possession of land, and a claim for the mesne profits of such land, are distinct causes of action, and may either be joined in the same suit, or sued for separately (Circular Order, 15th June 1849, Section 10 Act VIII of 1859).

The case before the Court is governed by Section 14 Regulation III of 1793. Under this law, the plaintiff was bound to bring his suit for mesne profits within 12 years from the date of the cause of action. Now, the cause of action in this suit arose, not from the date of the decree awarding possession, but from the date on which the profits were appropriated by the defendant. The plaintiff in this case delayed suing for possession for more than eleven years from date of ouster; and after obtaining a decree for possession in 1855, and recovering possession in execution of that decree in 1856, his present suit for mesne profits was not brought until July 1858, or 17 years after date of cause of action. I would, therefore, award mesne profits for a period of twelve years only.

I admit that a long current of decisions is opposed to this view of the case; and it may also be that the plaintiff with these decisions before him has been influenced by them. But I am of opinion that these decisions are contrary to the law; and that the great and unexplained delay of the plaintiff in the case before the Court ought to deprive him of any consideration. Further, I cannot admit that the pendency of the suit for possession was any "good or sufficient cause," such as to have precluded the plaintiff from obtaining redress in a timely action for mesne profits.

The 7th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble H. T. Raikes, F. B. Kemp, and L. S. Jackson, *Judges*.

Conveyance by Hindoo Widow.

Cases Nos. 79 and 84 of 1862.

Regular Appeals from a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of Dacca, dated the 13th December 1861.

No. 79.

Gobind Monee Dossee (Plaintiff) *Appellant*,

versus

Sham Loll Bysack and others (Defendants) *Respondents*.

Baboo Chunder Kallee Ghose for Appellant.

Baboos Onoocool Chunder Mookerjee, Nobbokishen Mookerjee, Chunder Madhub Ghose, and *Kaleekishen Sein* for Respondents.

No. 84.

Kali Koomar Chowdhry and others (Plaintiffs) *Appellants*,

versus

Ram Doss Shaha and others (Defendants) *Respondents*.

Baboo Chunder Kallee Ghose for Appellants.

Mr. C. Gregory, and *Baboos Onoocool Chunder Mookerjee, Kalee Mohun Doss, Kaleekishen Sein, Chunder Madhub Ghose, Nobboo Kishen Mookerjee*, and *Hem Chunder Banerjee* for Respondents.

Cases Nos. 201 and 210 of 1862.

Regular Appeals from a decision passed by the Judge of Beerbhoom, dated the 22nd February 1862.

No. 201.

Gour Huree Gooee (Plaintiff) *Appellant*,

versus

Pearee Dossee and others (Defendants) *Respondents*.

Baboo Banee Madhub Banerjee for Appellant.
None for Respondents.

No. 210.

Muchooram Sein (Plaintiff) *Appellant*,

versus

Gour Huree Gooee (Plaintiff) and others (Defendants) *Respondents*.

Baboo Dwarkanauth Mitter for Appellant.

Baboo Banee Madhub Banerjee for Respondents.

A conveyance by a Hindoo widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste destroying the widow's right and vesting the property in the reversioners, but is binding only during the widow's lifetime.

The reversioner can, during the widow's lifetime, sue to obtain a declaration that the conveyance is not binding beyond the lifetime of the widow, and also to prevent waste.

THE question which was referred for the consideration of a Full Bench in these appeals, is whether a conveyance by a Hindoo widow of

moveable property which she takes by descent from her husband, is valid during the widow's life, if the conveyance is made for causes other than those allowed by the Hindoo law; and if not, whether the reversionary heirs of the husband can *interfere* by suit to cause the property to be delivered up to themselves or to the widow.

The case has been very fully and elaborately argued on both sides. The principal authorities on the subject are collected in the Vyavastha Durpuna, a very useful book upon Hindoo law, by Baboo Shama Churn Sircar.

Katayana says:—

"Let the childless widow, preserving unsullied "the bed of her lord, and abiding with her vener- "able protector, enjoy the property restraining "herself until her death. After her, let the "heirs take it." (Colebrooke's Dá. Bhá. Cap. 11, Section 1, para. 56.)

Again—

"The widow is only to enjoy her husband's estate. She is not competent to make a gift, mortgage, or sale of it." (Idem).

In Colebrooke's Digest, Volume 3, page 465, it is said:—

"It fully appears that the widow's disposal of "her husband's property at pleasure, otherwise "than by the simple use of it, or by donation for "the benefit of the lord, is invalid."

Sir William Macnaghten, a very great authority, appears to have been of opinion that a gift or conveyance by a widow other than for allowable cause was void, not only as against the reversionary heirs of the husband, but also as against herself. (*See* Macnaghten's Hindoo Law, Volume I, pages 19 and 20.)

In the case of Doe dem. Bonnerjee *versus* Bonnerjee, the plaintiff was non-suited. The decision turned upon another point, and is no authority upon the question now under consideration; but it is important as containing the opinion which was delivered to East C. J., by Macnaghten, J, drawn up by his son Sir William Macnaghten.

The opinion was as follows:—

"If a widow make a sale in perpetuity of her husband's landed property, by a deed to that effect, the purchaser, as she had no right to make the sale, will not be benefited by it, nor will he be entitled, in virtue of it, to the interest *which the widow has in the estate.* This is founded upon the principle *of the sale being without ownership,* which renders it void *ab initio,* and not, as I before thought, upon the principle of a greater interest being conveyed by the deed than the widow was competent to grant. The Pundits, whom I have to-day consulted, agree in saying that, if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good as far as his share is concerned, because the sale creates ownership in the purchaser, and not the deed which is only proof of the sale, and may be taken to prove it as far as will serve that purpose, though invalid. With respect to the conveyance of the property of the other brothers, it is valid against himself, and is proof of his intention Not so in a deed made by a widow: *she has no unlimited proprietary right over any part of her husband's property, but merely a general usufructuary right over the whole indiscriminately.* It is clear, therefore, that she cannot convey the whole in perpetuity, but the deed by which he conveys it is void *ab initio,* as to the sale; nor can it convey the interest which she possessed, which (independently of its not being transferable) is an interest of a totally different nature from that of proprietary right." (2nd Morley's Digest, page 155).

The opinion that the purchaser would not be entitled during the widow's life, was founded upon the principle that she had no proprietary right over any part of her husband's property, but merely a general *usufructuary* right over the whole indiscriminately, and that the sale being without ownership was void *ab initio* by the Hindoo law. The opinion of Sir William Macnaghten was founded upon the same principle upon which he also gave his opinion in the same case that the sale of a father's property by a son during the father's lifetime was void *ab initio* upon the ground that it was a sale without ownership, and was, therefore, not binding after the father's death upon the son who succeeded to the property as his father's heir. Sir William Macnaghten appears to have considered that the widow had no greater right in an estate which she takes by descent from her husband, than a son has in the estate of his father during his father's life-time.

This, however, is not the case. In Goluck Monee Dabee *versus* Digumbur Dey (Sup. Ct., November 15th 1852), the Court said:—

"No part of the entire interest, when the widow takes by inheritance, is in suspense or abeyance in any way, nor is there a reversion on a life-estate, *but the whole interest is in the widow.* When she takes as heir under the Hindoo law, she is ranked in all treatises as heir. Sir Francis Macnaghten treats her estate rightly as anomalous, and other writers treat it as coming to her as heir; therefore, when they term it also a life-estate, they mean that expression in a sense different from that of a pure and mere life-estate." (Macpherson on Mortgages, 3rd Edition, page 25).

The Court goes on to say:—

"It has been invariably considered for many years that the widow fully represents the estate; and it is also the settled law that adverse possession which bars her, bars the heirs also after her, which would not be the case if she were a mere tenant for life as known to the English law." (Idem, page 27).

See also the case of Kasheenath Bysack and another *versus* Huro Soondery Dossee and another, in the Privy Council, 24th June 1826 (Clarke's Reports, page 91, and Montriou's Cases in Hindoo Law, page 495), from which it would seem that the widow takes more than a life-estate. See also Judoomonee Dabee *versus* Saroda Prosunno Mookerjee, 1 Boulnois' Reports, page 129; Macpherson on Mortgages, 3rd Edition, page 28).

In 6 Moore's Indian Appeals, page 433, Huree Doss Dutt *versus* Sreemutty Uppoorva Dossee, it

was held that the title of a widow to her husband's property, though a restricted one, was not in the nature of a trust.

There are some decisions in the Sudder Court in which it has been held that the conveyance does not operate as against the widow during her lifetime. There are others in which the conveyance has been allowed to operate against her during her lifetime.

In Hem Chunder Mojoomdar *versus* Tara Monee (18th December 1811, S. D. A. Rep. Volume 1, page 359), it was declared by the decree that a deed executed by the widow should not after her death operate to preclude the right of the surviving heirs, leaving it to operate during her lifetime.

In Krishna Gobind Sein *versus* Gunga Narain Sircar, the Supreme Court declared, a decided opinion that a widow had no right, other than for allowable causes, to make any grant of her interest in the estate which could endure beyond her own life. (Sir F. Macnaghten's Cons., Hindoo Law, page 19).

In the case of Ramanunda Mookhopadhya *versus* Ram Krishna Dutt (idem, pages 19 and 20), it was admitted by all the Judges of the Supreme Court that the grant which was made by a widow of property inherited from her husband, and which it clearly appeared was not made for the benefit of her husband's soul, was good for her life.

In Kasheenath Bysack and another *versus* Harasoondery Dossee and another, in the Privy Council, to which we have already referred, Lord Gifford, after reviewing the opinions of the different Pundits, observes :—

"The result, as it appears to me, of these different opinions, is this; that they all agree, as I have already stated, *that the widow Harasoondery Dossee is entitled to absolute possession; that she has, for certain purposes, a clear authority to dispose of her husband's property; she may do it for religious purposes, including dowry to a daughter, and making gifts and donations to the husband's family; but they differ in this—the Court Pundits say that if she alienates the property for other purposes, without the consent of the husband's relations, it would be invalid; the others say that though she would incur moral blame, if applied for purposes not allowed, yet the act would be valid as against the relations of the husband*; in that respect, the four Pundits differ from the Pundits of the Court, founding their opinion upon the doctrines contained in the *Ratná Kara* and *Chintá Mani* which were not over-ruled by the *Dayabhaga* and *Dayatatwa*" (Vyavastha Durpana, page 133.)

It appears also from the same judgment that two other Pundits were examined, and were asked whether they agreed with, or differed from, the opinions of the Court Pundits. Their answer was:—

"We agree upon all points with the opinions given by the Court Pundits yesterday, with this exception—they yesterday stated that gifts of moveable and immoveable property made by a widow, for other than allowable causes, *were not valid against herself* or the next heir of her husband. We agree with them that such gifts are not valid *as against the next heir of her husband; but we say that they are valid as against the widow who could not reclaim them*, whereas the heir is entitled to do so." (Idem.)

In Fulton's Reports, page 73, Kallachand Dutt *versus* Moore and others, Ryan, C. J., says:—

"That a grant made by a widow for her own life is good, has been decided in this Court."

Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindoo widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life. The reversionary heirs are not, after her death, bound by the conveyance; but they are not entitled, during her lifetime, to recover the property either for their own use, or for the use of the widow, or to compel the restoration of it to her. If the widow in any case be imposed upon and induced to execute a conveyance by fraud, the conveyance will, in such case, as in all other cases of fraud, be void.

It has been urged that the reversionary heirs may be prejudiced if they cannot sue for the property during the widow's life, for after her death it may be difficult to procure the necessary evidence to show that the conveyance was executed for causes not allowable; and that in the case of moveable property, such as money or valuable securities, irreparable injury may be done to the reversionary heirs by the grantees making away with the property during the widow's life, or in the case of immoveable property, by committing waste. But our decision will not preclude the reversionary heirs, even during the lifetime of the widow, from commencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immoveable, in the event of their making out a sufficient cause to justify the interference of the Court.

Our opinion will be reported to the Division Court, by which the question was referred to us, for their information and guidance.

The 8th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

Indigo Factories (Assignment of)—Dena powna (meaning of).

Cases Nos. 863 and 864 of 1861.

Special Appeals from a decision passed by the Additional Judge of Jessore, dated the 2nd March 1861, *modifying a decision passed by the Principal Sudder Ameen of that District, dated the 22nd December* 1860.

Mr. D. H. Kearnes and others (Defendants) *Appellants,*

Bhowanee Churn Mitter and others (Plaintiffs) and Mr. G. Macnair and others (Defendants) *Respondents.*

Messrs. R. T. Allan and *A. F. Lingham* for Appellants.

Baboos Sreenauth Doss and *Obhoy Churn Bose* for Respondents.

If a trader or other person in this country assigns his stock-in-trade or effects to another, and such other person enters into a contract with the other to pay the debts of the concern or a certain portion of such debts, the contract and assignment create a liability to the creditors, in whose favor the assignment is made, which they may enforce by suit.

An assignment of the stock-in-trade, under such circumstances, cannot be defeated by the creditors, nor can anything that takes place between the assignor and assignee affect the right of the creditors as against the original debtor. The creditors cannot compel the assignee to pay any debt, which, as between himself and the assignor, he is not bound to pay, and the creditor is not bound to elect between the original debtor and assignee, but may look to either or both for payment, the assignee being sued as a co-defendant with the original debtor, there being nothing to prevent the joinder of parties as co-defendants whose liability is not strictly joint.

A person covenanting can obtain relief from the express terms of his contract, if he can show that it was a mistake, and that the actual contract was to pay something less than was expressed in the writing.

Ordinarily the purchaser of a factory will not be liable for the debts unless by express agreement.

Where any debt is a lien against particular property, it must be enforced by a suit to declare such property liable, and to obtain payment for it, and not by an ordinary action for debt against the person who has taken the property subject to the debt.

The case was remanded by a majority of the Court to try the nature of the real agreement between the assignor and assignee with reference to th· debt.

Dissentientibus Steer, J. and Seton-Karr, J., who objected to the remand on the ground that, in contracting to take over the *dena-powna* of the factory and publishing the same by the act of registry, the assignee made himself liable for all the *boná-fide* debts of the factory, and that the private agreement between the assignor and assignee was of no force.

The Chief Justice and Justices Norman and Kemp.—By indenture, dated the 5th March 1857, Macdonald assigned to Kearnes his moiety of the Barganti Indigo Factory, and also of all balances, sums of money, bonds, &c., due and owing by ryots and other persons to the factory. The deed recited that Kearnes had agreed with Macdonald for the purchase of the moiety of the factory, as from the 1st of October 1856, for the price of 8,000 rupees, and that it had been agreed that Kearnes should take over the *dena-powna account* of the said factory in respect of the said half part or share as the same stood on the 30th day of September 1856.

The plaintiff sued for the recovery of rent due for lands which had been occupied with and for the use of the factory. The lease under which the rent became due had expired before the date of the indenture of assignment, and the rent sued for had become due before that date. The rent was in fact a debt due on account of the factory, or, in technical language, one of the debts of the factory. The terms of the agreement, as recited in the deed, were general—to take over the *dena-powna account* as it stood on the 30th of September 1856, and not any particular account as furnished by Macdonald. But it was contended that the true contract of the parties was that Kearnes should take over the debts mentioned in a list or schedule, dated the 30th of September 1856, and signed by Macdonald, though this instrument is not expressly referred to in the deed; and that, as the debt in question was not entered in this list, Kearnes was not liable to pay it.

The Judge says—"On looking into respondent Kearnes' bill of sale, dated 5th of March 1857, I find that he therein covenants to take over the *dena-powna account* of the factory of Barganti, 8 annas for himself and 8 annas as Attorney for Mr. Macdonald, as it stood on the 30th of September 1856. Now, as above shown, the sum in dispute was on the 30th of September 1856 a part of the *dena-powna account* of the above factory. But the respondent Kearnes pleads non-liability, because he says the sum in question was not entered in the *dena* account furnished to him by Macdonald, as by exhibit filed, dated the 30th of September 1856, under that person's signature. But in the first place that exhibit did not form a part of the bill of sale transaction of the 5th of March 1857. Then, secondly, although its accuracy was denied, and its alleged executor, Macdonald, was made a party to the suit by appellant, yet it was not attested, nor was its executor summoned by respondent Kearnes to attest it to the extent the law gives power to summon so as to compel attendance; and lastly, supposing it to be a *boná fide* paper, it only represented the *dena* of the factory as Macdonald believed them to be, and not as respondent accepted these *dena, viz.* in full and without reservation in the bill of sale of March 1857." It is clear that the Judge is mistaken in supposing that the bill of sale contains a *covenant* by Kearnes to take over the *dena-powna* account. It contains a recital of an agreement between Kearnes and Macdonald on that subject, and upon that agreement the rights of the plaintiff in the present suit rest. There is nothing in the bill of sale to alter the terms of the original agreement, whatever it was. If that agreement was, in fact, an absolute undertaking on the part of Kearnes to take upon himself all the debts of the factory, as they stood on the 30th of September 1856, and by the bill of sale all the property and assets of the factory were assigned to him for that purpose, we think that it must be taken to have incurred a liability to the creditors of

the factory which such creditors could enforce by suit. The contract would be for the benefit of such creditors, and would create a trust or obligation to them, which, we think, they could adopt and enforce. It would be very hard upon them if they could not do so. The bill of sale conveys to Kearnes Macdonald's share of the factory, and of the debts due to the factory to which the creditors of the factory had a right to look for satisfaction of their debts. That assignment being made honestly and upon a valuable consideration, *viz.* the contract of Kearnes to pay the creditors of the factory, could not in this country be impeached by the creditors. In England, an assignment of all the stock-in-trade and effects of a trade, under such circumstances, might be defeated by the creditors as being an act of bankruptcy and void as against them. Here, however, unless we were to hold that the creditors could sue the assignee, the whole of the assets of the debtor to which they have a right to look for satisfaction of their debts might be removed beyond their reach by assignment, and they would be left without remedy. By the law of this country, the right of action to recover a debt is capable of being legally assigned, so as to give the assignee a remedy by action at law, and there would seem to be no sound reason why the liability of the debtor should not also be assignable. It seems that, by the common understanding and custom of the country, the purchaser of an indigo factory who takes it with the *dena-powna*, is liable to be sued by the creditors of the concern. We, therefore, think that it may be laid down as a rule that, if a trader or other person in this country assigns his stock-in-trade and effects to another, and such other person enters into a contract with the first to pay the debts of the concern, or a certain portion of such debts, the contract and assignment create a liability to the creditors in whose favor such contract is made, which they may enforce by suit. By so holding, we think that we are only giving effect to that which, we find from several of the cases reported amongst the decisions of the late Sudder Court, has evidently been treated as the law and usage of this country with respect to the assignments of indigo concerns, though the principles upon which such liability must rest do not appear to have been very clearly stated or defined. We desire, however, to add that nothing which takes place between the assignor and assignee, under such circumstances, can, in any way, affect the right of the creditors as against the original debtor, unless the creditor has agreed to discharge him.

We think that the case must be remanded to the lower Court to try what was the real agreement between Kearnes and Macdonald with reference to the debt in question. The recital in the deed which is only evidence of the agreement, and not itself the agreement, refers to the state of things on the 30th September 1856; and the question will be whether the list under that date, and signed by Macdonald, was a mere estimate, or an essential part of the contract as an actual schedule of the debts which, and which alone, Kearnes, as between himself and Macdonald, undertook to pay.

We think that the plaintiff could not compel Kearnes to pay any debt which, as between Kearnes and Macdonald, he was not bound to pay, for although it is urged that the deed was registered, and the exhibit was not registered, the registry was not for the purpose of giving notice, to the creditors of the factory, of the contracts which Kearnes and Macdonald has not entered into, but to prevent a subsequent registered purchaser of the factory from obtaining a priority over Kearnes, if Macdonald should sell it to another person. But this is a special appeal, and we think that the finding on record is not sufficient to show that the exhibit in question contained a list of all the debts which Kearnes contracted to pay, or that it contained any fraudulent misrepresentation on the part of Macdonald in order to induce Kearnes to enter into the contract in general terms to take over the *dena* account of the factory.

In the above view of the law, we think that the creditor is not bound to elect between his original debtor and the assignee of the factory, but that he may look to the assignee for payment, and also have recourse to his original debtor in the same manner as the grantor of a lease may sue an assignee of the lessee for rent, and may also hold the original lessee responsible under his covenant. And, as we are not fettered by any strict technical rule which might prevent the joinder of parties as co-defendants, whose liability is not strictly joint, we think that the assignee may be sued as a co-defendant with the original debtor.

We desire to add some observations as to several grounds on which the judgment of the Court below is rested, and as to certain cases on the subject of the liability of the assignees of indigo concerns.

The Judge says that, by the bill of sale, Kearnes covenanted to pay the *dena* of the factory in full and without reservation, and therefore that he was liable, notwithstanding, that the rent in question was not mentioned in the list drawn up in September 1856. Now there is no express covenant by Kearnes to pay these debts. The indenture recites the existence of such an agreement. But, under the circumstances of the case, there is no sufficient reason for treating the recital as a covenant. To construe it as a covenant, we must alter the language; and though in order to carry into effect the evident intention of parties that may sometimes be done, that rule of construction does not apply, where, as in the present case, the application of it would alter the position of the parties to the prejudice of one of them. Even, if it were expressed in the language of a covenant, Kearnes would still be at liberty to obtain relief, if he could show that it was a mistake, and that the actual contract was that he was to be liable to pay only the debts in the schedule which were meant to be described, when the parties in the deed spoke of the

liabilities as they stood on the 6th of September 1856.

Secondly, he says.—"The respondent Kearnes was liable by the general custom of indigo planters. Sums due on account of current rents are not to be considered as the personal debts of the *pro tempore* proprietors, but as running with the land, and therefore, as a lien on the factory to which the land was attached." The deed of transfer does not specially charge this rent upon the factory, or declare the factory liable for the debt, so as to bring the case within the terms of the rule stated in Frith and Sandes *versus* Chunder Monee Dabea, S. D. A. Rep. 20th November 1857, page 1720.

Looking to general principle as well as to the authorities in the late Sudder Court, and particularly E. D. DeSarun *versus* Wooma Churn Sett, 15th December 1858, page 1814, there seems no ground whatever for saying that the back rents of a farm, the lease of which had expired before the sale of the factory, can be considered as a lien on the factory, and other property belonging thereto in the hands of a purchaser.

In Young *versus* Tiery, 20th March 1856, page 199, it was held that the *purchaser* of a lease *is not liable* for arrears of rent due by the previous owner, if the purchaser of the land out of which the rent issues is not, without express contract, liable for back rents, still less, it would seem, can a purchaser of land, out of which the rent did not issue, be held so liable.

Meares *versus* De Brandy, 22nd July 1862, S. D. A. Rep. page 716, was a suit for arrears of salary by a servant of a factory. The Court below held that the employer was *discharged* by the sale of the factory to the purchasers. The decision was reversed by the Sudder Court on the ground that the claim did not attach as a lien on the factory. But, whether it did so attach or not, it would be a monstrous doctrine to hold that one who has dealt with a person whom he knows or believes to be solvent should be deprived of his remedy against the person with whom he dealt by any act of the debtor without his own consent.

In Syud Mahomed Bakeer *versus* Blanchard Spence and Co., 11th March 1848, S. D. A. Rep. page 186, Mr. Tucker, in admitting the appeal, said—"The universal practice I believe to be, if nothing be said to the contrary, a person purchasing an indigo factory is responsible for the debts due by the factory". In delivering judgment, the Court say—"It is the general practice that, if money be borrowed for a factory by a party competent to borrow, the factory is responsible for it, notwithstanding transfer by purchase, as the transfer carries with it all the liabilities of the factory."

We have already seen that if, as in the present case, the purchaser by the contract of sale takes over the assets of the factory, and agrees to pay the debts, the creditors may adopt and avail themselves of the contract in their favor. It is hardly suggested that there is any local or special custom which carries the liability of the purchaser farther than this. Indeed any such custom would be certainly at variance with the general law applying to the case of incoming and outgoing partners. The rule applying to such cases is stated in Lindley on Partnership, Volume I, page 314—"A person, who is admitted as a partner into an existing firm, does not by his entry become liable to the creditors of the firm for anything done before he became a partner."—The same rule holds as to a purchaser.

The Court, in Syud Mahomed Bakeer *versus* Blanchard, further say—"The factory must be considered as chargeable with the debt." Land may be charged with a debt in the hands of a purchaser where any lien or equitable mortgage on the land is credited at the time of the creation of the debt, or in cases of ryots receiving advances under Regulation VI of 1823, Se tion 2; but ordinary debts do not imply liens on the property of the debtor. And, in cases where a lien exists upon particular property, it must be enforced by suit to declare such property liable, and to obtain payment by the sale or out of the proceeds of it, not by an ordinary suit for debt against the person who has taken the land subject to the charge. If it were otherwise, the whole property of such person, and not merely the property charged with the debt, would be liable. In Motee Lall Seal *versus* Muddun Thakoor, 16th January 1856, page 10, the substantial point was whether, according to the conditions of a bill of sale from the Sheriff, the plaintiff who purchased the interest of one Oman in a factory at the Sheriff's sale, took it subject to the liabilities which attached to it in Oman's hands. The question whether the plaintiff could maintain the suit was not raised. The case is very shortly reported and not satisfactorily, and so far as it states the debt not to be merely a personal one against Oman, appears not consistent with the latter case in the Sudder Court of De Sarun *vs.* Wooma Churn Sett, 15th December 1858, page 814.

The decision in this case governs that in No. 864.

Mr. Justice Steer.—I never entertained any doubt that, according to the well understood meaning of the words *dena-powna*, and the every day practice of owners of indigo concerns, the purchaser of a factory who takes upon himself the *dena-powna* of it, or in other words, the assets and liabilities, and publishes it to all the world in the most public and effectual way, *viz.* by a registration of the deed of purchase, and the terms of it in the office of the Registrar of Deeds, was liable to the creditors for debts contracted by the factory. But still creditors are not restricted in their action against the purchaser individually, but they may sue both him and the late owner; and the Judge, who so held in the Court below, took, therefore, a right view of the matter.

The Chief Justice, Mr. Justice Norman, and Mr. Justice Kemp, while upholding this view of the Judge, still considered that the case should be remanded, that the Judge may enquire for

what particular debts the purchaser, Mr. Kearnes, agreed to hold himself liable.

I cannot assent to an order of remand on these terms. In the deed of sale, all the debts of the factory (that is, of course, all debts, for which the factory could be legally held liable) were without any specification all taken over, the whole *dena-powna*, whatever they were at the time. That deed *alone* was registered; but some days afterwards, as it is alleged but not proved, Macdonald the old proprietor, and Kearnes the purchaser, privately drew up a schedule purporting to show the debts due by the factory, in which schedule the rents due to the plaintiff in this case do *not* appear. That schedule was not registered, nor was anything done to give it the least publicity or to apprize the creditors of the factory that, by this private arrangement which was so greatly in modification of the published deed of sale, the whole *dena-powna* outstanding at the date of sale was not transferred to the purchaser.

To hold that there should be enquiry as to what particular debts Kearnes agreed to take over, which enquiry may possibly end in its being found that the debt due to the plaintiff was not one of the debts transferred to Kearnes, may, and probably will, be productive of the greatest hardship to the plaintiff; for Macdonald, having sold the factory with its liabilities generally, may be in Europe, or he may be dead, leaving no assets, and there may be no way of recovering the debts from him. Thus Kearnes may possibly evade a debt which, by his own public act, he acknowledged himself to be liable for, and which by the terms of his registered contract he is liable for, by a device which any one may hereafter adopt. He and Macdonald say to the public, we have agreed that the factory changes hands, and we have agreed that Kearnes recovers all the debts due to the factory, and that he pays the factory debts. In private, they make another agreement, the effect of which may be that Kearnes is liable for no debt whatever, while Macdonald, by hood-winking the creditors, has succeeded in getting out of the country, and out of reach of any legal proceedings.

By the terms of their published deed, Kearnes is liable for all the debts of the factory generally; and as from him alone there is any hope of recovering anything, I cannot agree to a remand which may possibly end in Mr. Kearnes being able to show that, whereas he in the most public manner held out to all the creditors that he was the party to look to, he had, by another and a private arrangement between himself and Macdonald, of which the creditors had no knowledge, settled that he was to be liable, not for all, but only for some of the debts.

I would, therefore, with every deference to the opinion held by the Chief Justice and his other two learned colleagues, uphold the judgment of the Lower Court, and dismiss the appeal with costs.

Mr. Justice Seton-Karr.—These cases have had our long and earnest consideration. As the facts, which are not complicated, are stated clearly in the decisions of the Zillah Judge, dated the 2nd March 1861, in the opinion of the two Judges (Justices H. V. Bayley and G. Campbell) who referred the case to a Full Bench, and in the judgment of my colleagues, it is unnecessary to recapitulate them here.

The case involes a very important principle affecting the interests of all persons in the interior of the country who have to do with indigo factories and their lands, whether such persons be Europeans or Natives; whether they be managers, superintendents, or owners of factories on the one hand, or Natives who have dealings with the factories on the other, on account of lands, rents, &c., &c. I have thought it necessary to go into all the decisions of the late Sudder Court in this important matter, and I herewith subjoin a précis of them in the margin.

S. D. A. Decisions			
for	1848,	page	186.
„	1852,	„	715.
„	1856,	„	10.
„	1856,	„	199.
„	1857,	„	1720.
„	1858,	„	1814.
„	1860,	„	54.

In the first case, three Judges of great experience in the customs under which lands and factories are held and transferred in the interior, were decidedly of opinion that "it is the general practice that, if money be borrowed for a factory by a party competent to borrow, the factory is responsible for it, notwithstanding transfer by purchase, as the transfer carries with it all the liabilities of the factory;" and, "with reference to the usual practice in such cases, and to what the justice of the case demanded," the Court proceeded to charge the factory generally for a debt contracted by a partner who had an 8 annas share therein, but contracted for the general good of the whole factory.

In the next case (De Brandy *vs.* Meares), the Court held that the Judge below had wrongly made the new proprietors liable for the salary of an assistant employed in the factory, on the supposition of a general practice applicable to such cases, *whereof there was no evidence on the record;* and the Court relieved the new proprietors from the claim, as one which would not lie, without some reference to any contract which might have been made between the vendor and vendee, regarding the payment of outstanding claims and debts.

In the case now before us, I must remark that there is direct evidence of what was the contract as to *dena-powna*, between the old and the new purchasers.

One of the Judges, who admitted the special appeal in the above case just reviewed, remarked pertinently on the hardship to which petty factory servants would be subjected, if they were not considered to have a lien for wages on the factory for and in which they worked.

In the next case (Muddun Thakoor *vs.* Motee Lall Seal, page 10 of 1856) two Judges, Mr. J. Torrens and Mr. C. Trevor, held that, as the bill of sale was express as to the liability of the purchaser for the debts or *dena*, the new owner was liable for back rents; and the third Judge, Mr. Sconce, concurring in opinion with his colleagues, further stated that whatever private arrange-

ments had been made by the debtor appealing against liability for rents, the interest of the plaintiff, zemindar, could not be sunk thereby, and that the transfer of the land carried with it the liability for rent.

In the next case (Young *vs.* Tiery, page 199 of the same year), the Court released a lessee from the liability for rents accruing previous to his purchase and entry, but did so expressly on the ground that it was not said "that he was not bound *by the terms of his* purchase to liquidate past balances, or that the assignment of the lease to him had in any way lessened the plaintiff's power of recovering the old arrear from the first tenants." In this last case, it seems to me pretty clear that no plea of a purchase with express liability for the *dena-powna* had ever been raised. The point was that a lessee generally could not be made liable, unless so stipulated.

The next case is a well known one (R. Savi and others *vs.* Frith and Sandes, page 1720 of 1857). The case turned on a bond for money borrowed for the expenses of the factory, and the Court ruled that the deed in question was "drawn up in the terms of an ordinary bond, without any reference whatever to the factory for which allowedly the sum in litigation was borrowed;" and with regard to a plea of *general practice*, whereby the liabilities of a factory attached, as it was urged, to the factory, the Court was "not satisfied of the existence" of any such general custom, but added that such a general custom, if established, might govern the decisions of the Court, while the use of the word *dena-powna* in documents drawn up in the Bengalee language, "would render argument superfluous," as under these terms are clearly included both the liabilities of the vendor and also the debts due to him, while in English conveyances, the Court would have to look to the express terms used.

On the whole the Court, referring to two of the cases cited above, *viz.* those of 1848 and 1852, ruled that the correct principle was that the liability of a new purchaser for the personal debts of a vendor depended, first on the express contract between them, and if there were no written contract, then on the general or particular custom, or on other circumstances of the case.

The conclusion drawn by the Court in this case, while releasing the new purchasers, was that parties lending money to a factory should take care to have the loan made a lien on the factory by express terms, and if they did not, that they could only have their remedy against the original borrowers.

In the next case (Ooma Churn Sett *vs.* E. DeSarun), the Court, in conformity with the decision just reviewed, said that the presumption was, not that the new purchaser took the factory with its liabilities, but that the parties claiming rents were bound to prove, by special engagement or otherwise, that the debts were not personal and that the factory was liable. In this view, the Court held plaintiffs entitled to rents from the new owners only *from the date of the purchase.* But, in this case, the bill of sale, which might have shown the real state of the case, was repeatedly called for, but had never been produced in the first Court.

The last case quoted (Latafut Hossein *vs.* R. Savi, page 55 of 1860) merely turns on a question of costs, and throws but little light on the present question.

From the above review, I draw the following conclusions. The existence of a well understood custom, whereby the new purchaser, on taking the *dena-powna*, is empowered to collect all outstanding balances, and is liable for all *bonâ fide* debts incurred for and on account of the factory, has been openly recognized in some decisions of the Sudder Court by Judges of great experience. The existence of such a custom has *never* been positively denied by other Judges, even when in particular cases, from the facts before them, they have refused to hold the new purchasers liable. The utmost that these latter Judges have done is to rule that there was no evidence of such a custom in the case before them. In the case now before our Full Bench, the principle was directly contended for by the plaintiff himself as one recognized by all indigo concerns, and the Judge of the Court below has acted on and recognized the same principle. Its existence, and a general and wide-spread belief in its existence, were admitted by Mr. Allan, who, however, argued the case for the non-liability of the new purchaser before us on special grounds.

From the above, it follows that I concur in a great deal of what has been laid down by the Chief Justice and my other colleagues, Justices Norman and Kemp, in their judgment. The ruling that the purchaser of a factory in this country, who takes it with the terms *dena-powna*, is liable to be sued by the creditors of the concern, seems to me a sound ruling, and one in accordance with several earlier decisions of the late Sudder Court, as well as in conformity to the common understanding and custom of the country, and to the necessities and contingencies under which trade must be carried on, and concerns must change hands, in the interior of this country where the sudden departure of owners and managers is, for obvious reasons, inevitable.

In the case now before us, the terms *dena-powna*, were used, and, I have no doubt, used advisedly and with a full knowledge of their meaning and interpretation, by the English Firm in Calcutta which drew up the transfer, from Macdonald to Kearnes, of March 1857, in the phraseology common to English legal documents of that kind.

I also concur in that part of the judgment which rules that the creditor is not bound to elect between its original debtor (Macdonald) and the assignee of the factory (Kearnes), but that he may look to the assignee and the original debtor, either or both, as he thinks fit. For, though under the custom of the country so well understood by European gentlemen and

natives of all classes, I believe that the creditor will ordinarily consider the purchaser to stand exactly in the shoes of the original proprietor or assignor, and will look to that purchaser to sue, and be sued, and, though I hold that factories do change hands constantly on this understanding, the new purchasers discharging the liabilities, and collecting the dues without having recourse to law-suits, still there may be cases where he ought not to lose his remedy against the original debtor, but should be allowed to proceed against him for the recovery of his claim.

But I am unable to concur in that part of the judgment which would remand the case for the reasons given. I think that the reasons given by the Judge for holding Kearnes liable, as well as Macdonald, in this instance, are full and sufficient.

The Judge finds as a fact, and on full and satisfactory evidence, that the sum claimed as rents was due for lands taken for the use of, and attached to, the factory, and was not denied by Kearnes to be due on the date from which Kearnes took over the concern, *i. e.* on the 30th of September 1856, or the last day of the indigo year.

He also finds that the alleged separate paper, the existence of which was only known to Kearnes and Macdonald, was not proved as it ought to and might have been; and it seems to me a hard doctrine when applied to these cases, that creditors are to be admitted to sue assignees or purchasers of such concerns who take them roundly with their *dena-powna*, or assets and liabilities, and yet are liable to have their claims defeated by separate and secret agreements, of which they could have no possible knowledge or inkling whatever from the terms of the conveyance between the principals. It appears to me, on this, that the only notice which the creditors could have of the transfer, was the registered conveyance, and that this deed was notice to all concerned of the person to whom they were in future to look as capable of suing and being sued. Of course, in being desirous of upholding the decision of the Judge on this point, I did not intend to rule that all debts must in all cases be discharged by the new purchaser. Each debt must be judged of by the circumstances under which it was incurred. There may be debts, which, on investigation, may not be found to attach to the factory, but to be personal liabilities of the late proprietor. In this case, however, the Judge finds on good evidence that the debt runs with, and is admitted to run with the land, and that the new proprietor accepted the transfer by a public deed, without any reservation. To give Macdonald and Kearnes an opportunity of now proving the nature of any separate and secret agreement between them, would be, as I read the transaction, to imperil the just claims of the creditors. The separate schedule ought to have been filed and registered with the bill of sale of March 1857. If Kearnes should now establish the *bonâ fides* of his separate agreement with Macdonald, and should show that this special debt was, by mutual agreement, excluded from the general liabilities, to what remedy would the creditor be left? Macdonald, as Mr. Justice Campbell particularly observes in his reasoning on this part of the subject, with which I wholly concur, "may be at the other end of the earth."

For the above reasons, while entirely concurring in the general principle which the judgment of three Judges of the 8th of April clearly sets forth, I am compelled to dissent from the order of remand for further evidence.

I would uphold the decision of the Judge, Mr. Hobhouse, including both Macdonald and Kearnes in the decree, and would dismiss this appeal with costs.

The 11th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble L. S. Jackson, Shumboonauth Pundit, E. P. Levinge, and E. Jackson, *Judges.*

Hindoo Law—Inheritance—Step-mother.

Case No. 3024 of 1862.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 23rd September 1862, affirming a decision of the Second Principal Sudder Ameen of that District, dated the 9th August 1862.

Lalla Jotee Lall (Plaintiff) *Appellant,*

versus

Musst. Doorance Kooer and others (Defendants) *Respondents.*

Mr. G. C. Paul and *Baboos Kishen Kishore Ghose, Unnodapersad Bannerjee, Kishen Succa Mookerjee, Kali Prosonno Dutt, Greeja Sunker Mozoomdar*, and *Motee Loll Mookerjee* for Appellant.

Mr. R. T. Allan, and *Baboos Dwarkanauth Mitter, Sreenauth Doss, Banee Madhub Banerjee, Khetternauth Bose, Kedarnauth Chatterjee*, and *Moonshee Ameer Ali* for Respondents.

A step-mother cannot take by inheritance from her step-son.

This case was referred for the opinion of a Full Bench by Mr. Justice Kemp and Mr. Justice Campbell.

The question to be considered is, whether, assuming the family to be a divided one, a step-mother can succeed to the estate of her step-son, according to the law prevalent in Mithila.

It is clear that, according to the law as current in Bengal, the step-mother cannot succeed to the estate of her step-son.

But it is contended that, according to the Mitachshara, which is the law prevalent in Mithila, a different rule prevails.

We have considered the several authorities cited in the course of the argument, and are

clearly of opinion that the step-mother cannot succeed.

It was admitted that the decisions, 1 Select Cases, S. D. A., pages 37 and 39, are the only express authorities in her favor. In those cases the right of the step-mother was upheld, but doubts are thrown upon them by Mr. Macpherson in his notes. The question depends upon the sense in which the word "Mata" is used in the Mitachshara in the Chapter on Inheritance.

It was urged that, when a distribution is made after the life of the father, a step-mother is included under the word "mother."

In the Mitachshara, the rule is laid down at page 285, paragraph 2, where it is said, "Of heirs separating after the decease of the father, the mother shall take a share equal to a son;" and our attention was called to the fact that, in the Mitachshara, there is nothing to show that the step-mother is not included, whereas in the Dyabhaga, page 63, paragraph 30, the step-mother is expressly excluded.

We think that the rule, whatever it may be in the case of partition, is not necessarily applicable to the case of Inheritance; and that, although the word "Mata" may, in some cases, include a step-mother, it does not necessarily do so in all cases. The passage cited from Macnaghten's Hindoo Law, page 50, related to partition. We must look to the circumstances of each particular case in which the word is used.

It would be contrary to the reason for which, according to the Mitachshara, a mother succeeds to her natural son in preference to his father, to hold that the word "mother" includes a step-mother.

In Section 3, Chapter 2, page 343 of the Mitachshara it is said, "On failure of those heirs (speaking of daughters and daughter's sons), the two parents, meaning the mother and the father, are successors to the property,"—para 1.

Paragraph 2 assigns a reason why, in construing the above text, the mother takes the estate in the first instance, and, on failure of her, the father.

Paragraph 3 proceeds,—"Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text, as to the nearest Sapinda the inheritance next belongs."

In the note to paragraph 3 it is said—"The mother is in respect of sons not a common parent to several sets of them, and her propinquity is, therefore, more immediate, compared with the father's. But his paternity is common, since he may have sons by women of equal rank with himself, as well as children by wives of Khetriya and other inferior tribes, and his nearness is, therefore, more mediate in comparison with the mother's. The mother, consequently, is nearest to her child, and she succeeds to the estate in the first instance, since it is ordained by a passage of Menu that the person who is nearest of kin shall have the property."

The reason given in the above cited passage from paragraph 3 shows that a step-mother is not intended to be included in the word "mother." Strange in his Book on Hindoo Law, page 144, refers to the paragraph as an authority in support of the text—"Step-mothers, when they exist, are excluded." *See* also Macnaghten's Note 1 Select Cases, page 39, note (*a*), id 42, note (*a*). There are other passages in the Mitachshara with regard to the rights of grand-mothers to succeed to the property of grand-sons in preference to grand-fathers, which show that step-grand-mothers could not be included—*see* Chapter 2, Section 4, para. 2, id Section 5, para. 2, and the notes on those passages.

For the above reasons, we are of opinion that a step-mother cannot take by inheritance from her step-son.

We may remark that our opinion is in conformity with the table of succession prevalent in the Western Schools, including Mithila, prepared by Baboo Prosonno Coomar Tagore according to the Mitachshara, Vivada Chintamoni and other works, in which it will be found that "step-mother" and "step-grand mother" are entered as *nil*. The table immediately succeeds the preface to Vivada Chintamoni by Prosonno Coomar Tagore.

This opinion will be communicated to the Division Court, by which the question was referred to us for their information and guidance.

The 12th April 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer and W. Morgan, *Judges*.

Ejectment of Lakherajdar by Zemindar—Onus probandi.

Case No. 129 of 1862.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 8th November 1861, reversing a decree of the Principal Sudder Ameen of that District, dated the 21st August 1860.

Mun Mohinee Dossee and others (Plaintiffs) *Appellants*,

versus

Joykissen Mookerjee and others (Defendants) *Respondents*.

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellants.

Baboo Banee Madhub Bannerjee for Respondents.

Suit to recover possession of land from which the plaintiff had been ousted by the defendant under Section 10 Regulation XIX of 1793, on the ground that it was an invalid lakheraj created after 1st December 1790. HELD that the zemindar having no right to oust the lakherajdar, unless the lakheraj was created after 1st December 1790, must prove that the lakheraj was created subsequently to that date, and that it was not for the lakherajdar to prove that the lakheraj was created prior to that date.

Mr. Justice Steer.—The plaintiff sues in this action to recover possession of certain lakheraj lands from which the defendant has ousted him. He avers that he held the lands as lakheraj from a date prior to the acquisition of the Dewanny by the British Government, and he values his suit at 18 times the annual produce.

The defendant answered that he dispossessed the plaintiff of the lands which he held on the pretence of their being lakheraj, in virtue of his right under Section 10 Regulation XIX of 1793, that is, because the lakheraj was created subsequent to the 1st December 1790, and the above law gave him authority of his will to resume such tenures.

The first Court went fully into the grounds of the plaintiff's title, and thinking that there was evidence that the lands had been held as lakheraj anterior to the 1st December 1790, decreed to plaintiff the right to regain possession.

The Judge in regular appeal went also into the question of the plaintiff's title, and, finding that by the deeds there was no evidence that these lands were held as lakheraj at any earlier period than 1802 (the date of a Taidad), he considered that the plaintiff had failed to prove his right to dispossess the defendant.

The plaintiff appeals specially, and his ground of argument is that, as his suit is merely one for possession, the Court below went beyond the proper scope of the case in looking into the validity of his title; that, under the precedent of 8th March 1858, he had a right, as he had so brought his suit and as he had proved that he had been forcibly dispossessed, to be restored to his former position. He maintains too that the burden of proving that his tenure was in existence prior to the 1st December 1790, ought not to have been thrown upon him; but that the defendant, who averred that the creation of the tenure was subsequent to the 1st December 1790, should have been called upon to prove that fact; and, as he has given no proof of this, he has failed to show that his act of dispossession was under warrant of any legal right conferred upon him.

I find that his suit, as it was brought, was not one which can be regarded as a mere possessory action. It was instituted on a stamp of sufficient value to entitle the plaintiff to demand an adjudication of his title; the pleadings were framed as if the suit was one of title; proofs of title were given; and the Court below were allowed to regard the suit as one involving the merits of the plaintiff's title. To say, therefore, that the action was merely for possession, is not in accordance with fact.

But allowing that it was simply a possessory action, I do not think that the plaintiff could have succeeded in the object of his suit without adducing proof that his lakheraj tenure does not fall within the class mentioned in Section 10 Regulation XIX of 1793, *viz.* that of tenures created since the 1st December 1790. There is a ruling to this effect in the decision of this Court of the 22nd June 1858 in a very similar case; and as the Lower Court has found as a fact, upon the proofs laid before it by the special appellant himself, that the date of the creation of this lakheraj was not antecedent to 1790, I must hold, conformably to the decision above quoted, that the plaintiff has not established his right to be put back into possession.

I would accordingly dismiss the special appeal with costs.

Mr. Justice Morgan.—In my opinion the Court of Appeal has decided in this suit a matter which the plaintiff (appellant in the special appeal) has a right to have adjudged in a suit of a different nature, and the plaintiff is thereby injured.

The question for decision in *this case* is, whether the plaintiff shall be reinstated in his alleged lakheraj holding. Hereafter, there may be a suit to decide whether the land is lakheraj land or not. In any such suit it may be that the lakheraj will be found invalid. But it is premature to consider that question at present. The plaintiff has given material evidence to prove a possession, by himself and his ancestors from a time prior to 1790, of this land as lakheraj land. He has offered reasonable proof that no rent was in fact paid, and that the exemption from payment of rent was claimed on the ground that the land was lakheraj. He was entitled to ask the Court to determine whether such evidence was not sufficient to enable him to be restored to possession, and to be restored to possession as a person who had given *primâ facie* proof of a lakheraj title. If the Court thought that he had proved this, it followed that the defendant had unlawfully dispossessed him under Regulation XIX of 1793.

As the Court of Appeal has not considered, whether the proof given by the plaintiff is sufficient for this purpose, and as its judgment is on a question not necessarily involved in the present suit, *viz.* whether plaintiff is or is not a person having a valid lakheraj title, I think that judgment wrong.

The Chief Justice.—I concur with Mr. Justice Morgan. This is not a suit for resumption or assessment but a suit by the plaintiff to recover possession of lands from which he has been ousted by the defendant under the provisions of Section 10 Regulation XIX of 1793, upon the ground that it was an invalid lakheraj created subsequently to the 1st December 1790. It may be that the land is not valid lakheraj, or it may be that it is valid. That may be tried in a proper suit brought for the purpose. But the defendant had no right to oust the plaintiff from the possession unless the lakheraj was created subsequently to the 1st December 1790.

I am of opinion that it was for the defendant to prove that the lakheraj was created subsequently to that date, and not for the plaintiff, who was in possession of the land as lakheraj until he was ousted by the defendant, to prove that the lakheraj was created prior to that date.

If the law were otherwise, a zemindar who wished to get rid of a lakheraj, instead of suing to assess or resume the land, would have

nothing to do but to oust the lakherajdar upon the allegation that the lakheraj was created subsequently to the 1st December 1790, and to leave the person ousted to prove that he had a valid lakheraj.

The decree of the Lower Appellate Court must be reversed, and this appeal decreed with costs and interest.

The 21st June 1864.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp and Shumboo-nauth Pundit, *Judges.*

Hindoo Law of Inheritance—Father's Brother's Daughter's Son.

Case No. 2130 of 1863.

Special Appeal from a decision passed by Mr. P. Taylor, Judge of East Burdwan, dated the 18th April 1863, affirming a decision passed by Mr. S. Wright, Sudder Ameen of that District, dated the 21st November 1862.

Gobindo Hureekar (Defendant) *Appellant,*

versus

Woomesh Chunder Roy (Plaintiff) *Respondent.*

Baboos Dwarkanauth Mitter, Onoocool Chunder Mookerjee, and *Upprokash Chunder Mookerjee* for Appellant.

Baboos Debendro Narain Bose and *Chunder Madhub Ghose* for Respondent.

A father's brother's daughter's son cannot inherit according to Hindoo law.

THE plaintiff in this case, claiming as heir in reversion, sued to set aside *first*, a deed of conveyance executed by the widow of his maternal uncle, Thakoormonee Dossee. The Sudder Ameen found that this deed was a collusive document. He says that, under Hindoo law, she could not dispose of the whole of her late husband's property, even though it was for the performance of his funeral rites ; and that her statement that she did so is a falsehood. For this he gave his reasons at length, and accordingly decreed that the sale should be set aside. On appeal, the Judge affirmed the decree because, as he says, the grounds on which the Sudder Ameen has declared the kubalahs pleaded by the defendant to be untrustworthy documents, are very good and tangible.

We think that we cannot disturb this decision on special appeal, because, though the language of the judgment might be and ought to have been a little more precise, it is clear that the Judge means to adopt the finding of fact of the Sudder Ameen, that the sale was not for the purpose of providing or paying for the Gya Shrad of the deceased, which was the necessity alleged to justify it.

We, therefore, affirm the decision of the Court below, as regards the property comprised in the conveyance executed by Thakoormonee.

Secondly. The plaintiff, claiming as heir in reversion of one Muddun Mohun, sues to set aside a sale said to have been made by Chunder Monee, the childless widow of Muddun Mohun. He obtained a decree in the Court of the Sudder Ameen which was affirmed by the Judge ; and from that decree the defendant now appeals, and contends that the plaintiff, not being an heir, cannot question the defendant's title.

The plaintiff (respondent) stands to Muddun Mohun in the relation of father's brother's daughter's son, and the point raised before us is, whether, according to Hindoo law, he could, under any circumstances, inherit as heir of Muddun Mohun.

The appellant's vakeel showed us that, according to the text of the Dyabhaga, a father's brother's daughter's son is not enumerated in the order of heirs, and referred us to a judgment of Mr. Justice Seton-Karr and Mr. Justice Campbell, dated the 31st March 1863, Huree Madhub Roy *versus* Gooroo Gobind Chowdhry, affirming a decision of Mr. Justice L. S. Jackson, when Judge of Rajshahye, to the effect that such a person is not an heir, and to the opinion of the Pundit in a case which is to be found in 2 Macnaghten's Hindoo Law, page 77.

Baboo Debendro Narain Bose for the respondent referred us to a great number of authorities directly affecting the respondent's title as heir, *viz.* the text of the Dya Krama Sangraha as translated by Winch, pp. 19, 22, 23, the opinion of Jugunnatha Turkapunchanana, Colebrooke's Digest, Volume IV, page 230, Macnaghten's Hindoo Law, Volume I, page 21, Strange's Elements of Hindoo Law, Volume I, page 148, Volume II, page 253, Elberling on Inheritance, page 80. He showed that in the Vyvastha Durpana of Shama Churn Sircar, Volume I, pp. 265,275, and the table of succession published by Baboo Prosunno Coomar Tagore there referred to, the order of heirs in Winch's Edition of the Dya Krama Sangraha is adopted, that a reason for allowing the brother's daughter's son a place in the line of inheritance, *viz.* that he offers two oblation cakes in which the deceased owner participates, is given in the Dya Krama Sangraha, and that reason is relied on in the latest work on the subject by Shama Churn Sircar. He also referred us to Macnaghten's Hindoo Law, Volume II, page 93, Section 4, and the Dyabhaga, page 218, as showing the importance of the offering of oblation cakes in determining questions of heirship. Indeed, Shama Churn Sircar in the Vyvastha Durpana, Volume I, page 315, says that the law as current in Bengal ordains that that relation who, by presentation of oblations, confers the greatest benefit on the deceased proprietor, is entitled to inherit his estate.

Looking at these numerous authorities, and the fact that the decision of Mr. Justice Seton-Karr and Mr. Justice Campbell is at variance with two prior Persian decisions of the late Sudder Court, referred to in their judgment; and feeling it to be of very great importance not to disturb the established course of descent, what-

ever that might be, we thought it desirable that the case should be further argued, and called in our learned brother Shumboonauth Pundit to sit with us on the second hearing. Baboo Dwarkanauth Mitter, in a very able argument, contended that the passage declaring the right of a brother's daughter's son to succeed as heir does not exist in many of the copies of the Dya Krama Sangraha (*see* the statement of the Pundit, 2 Macnaghten's Hindoo Law, page 77); that the internal evidence of the text itself shows that that passage in question is an interpolation, inasmuch as the argument and text in the passage which immediately follows is inconsistent with it, and shows that the paternal grandfather immediately succeeds the father's daughter's son. He proceeded to show that the copy of the Dya Krama Sangraha possessed by Colebrooke could not have contained the disputed passage. Mr. Colebrooke in his two treatises on the Law of Inheritance, note to the Dyabhaga, page 226, says that, "amidst this disagreement of authors, I should be inclined to give the preference to the authority of Sreekrishna's Krama Sangraha; because the order of succession as there stated follows the analogy of the rule of inheritance on the father's side;" and he showed that this would not be the case, if the disputed passage were genuine. This note of Mr. Colebrooke was published in 1810, and Mr. Winch's translation of the Dya Krama Sangraha not till 1818. He then showed that the Dya Krama Sangraha is, as its name indicates, a mere digest or compilation; and he argued that, if the author had intended to express an opinion at variance with the texts and authorities he was digesting, he would have stated what the opinion was from which he differed, and given a reason or cited an authority for the opinion adopted by him, more particularly since it is at variance with his own opinion in the Commentary on the Dyabhaga.

On examination of the Sanscrit text of the Dya Krama Sangraha, it appeared that it is not in verse or divided into numbered passages like the English translation, so that the insertion of an additional paragraph would not at once fix the attention of a reader.

He next argued that the reason adduced by the author of the disputed passage and by Shama Churn, for inserting a brother's daughter's son in the list of heirs, is not of itself sufficient to determine the question. He showed that a man offers three oblations to ancestors on his father's side, and three to ancestors on his mother's side; that a son's daughter's son, or grandson's daughter's son, or great grandson's daughter's son, or nephew's daughter's son, or grand-nephew's daughter's son and a paternal uncle's daughter's son can all offer oblation cakes, and in fact that some of them confer greater benefits than a brother's daughter's son, yet they are nowhere enumerated in the list of heirs; and he stated that, as such persons succeeded to the obligation of offering a cake without taking the inheritance, the person who succeeds to the estate is considered bound in morality to give them some assistance. He also showed us that the order of succession in the Dyatatwa is the same as that in the Dyabhaga, and omits relations of the class under discussion.

These arguments appear to us to shew to demonstration, that the disputed passage is an interpolation and no part of the original text of Sreekrishna; that the whole current of authority cited for the respondents flows from this corrupt source; that Mr. Colebrooke really condemned the opinion of Juggunnatha Turkapunchanana which he is supposed to have adopted; that the reason relied on by Shama Churn is insufficient in the absence of authority to support his position. We, therefore, agree with Mr. Justice Seton Karr and Mr. Justice Campbell in thinking that a father's brother's daughter's son cannot under any circumstances inherit according to Hindoo law; and we reverse the decision of the Court below on this point with costs and interest in proportion. It is undoubtedly unfortunate that those who are not only near relations, but capable of conferring the benefits which the owner of an estate, according to Hindoo ideas, expects from his heirs, should be excluded from inheritance. But the remedy, if any is desired, must be sought from the Legislature and not from the Courts, who can only expound and administer the law as they find it.

The 21st June 1864.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble C. Steer and F. B. Kemp, *Judges*.

Additional Grounds of Appeal—Evidence—Witnesses (Non-examination of)—Documents (Non-production of, filed in another pending case).

Case No. 2041 of 1863.

Special Appeal from a decision passed by Mr. A. Hope, Officiating Judge of Hooghly, dated the 4th July 1862, *affirming a decision passed by Baboo Woopendro Chunder Nyarutton, Principal Sudder Ameen of that District, dated the 4th July* 1862.

Rughoonauth Bose (Plaintiff) *Appellant*,

versus

Oomed Ali and others (Defendants) *Respondents*.

Mr. J. W. B. Money and *Baboo Otool Chunder Mookerjee* for Appellant.

Baboos Onoocool Chunder Mookerjee and *Bhyrub Chunder Banerjee* Respondents.

The special appellant (plaintiff) applied to add two grounds to his petition of special appeal, 1st, that material witnesses had not been examined, and 2nd, that certain documents filed in another pending case had not been sent for and inspected by the Appellate Court.

Kemp J. thought that the permission should be refused, because the plaintiff had nowhere stated to the Lower Court that the witnesses in question were material wit-

nesses, or insisted on their being examined; and that he had never applied to the Court for the production of the documents, and that, even if he had, it was in the discretion of the Court to send for the documents or not.

Steer J. thought that the Court had acted improperly in discharging the witnesses till they had been examined by the plaintiff; and that, though the Court was not bound to send for the documents, it was unfair not to do so.

Norman C. J. held that the Lower Court was justified in discharging the witnesses, and, if unsuccessful in his application, to have made this a ground of appeal. As to the documents, he held that, when a proper application was made to a Judge under Section 138 Act VIII of 1859, to send for, from the records of his own Court, papers which would be evidence in the case before the Court, the Judge had no discretion in the matter, but that the Section must be treated as giving a power which the Judge was bound to exercise, the principle being that where a Statute confers an authority to do a judicial act in a certain case, it was imperative on those authorized to exercise the authority when the case arose.

Mr. Justice Kemp.—The plaintiff, special appellant, sued the defendant, special respondent, to recover possession of 1 beegah, 3 cottahs of land with mesne profits. Plaintiff alleges that he purchased 5 beegahs 16 cottahs of land from one Golabdhee, and that the land in dispute is included in his purchase.

The defendant states that the vendor of the plaintiff was never in possession of the disputed land, that the defendant's vendor took a lease from the former under the Court of Wards, and that his vendor and afterwards himself are in possession. The zemindar at first backed the defendant, but subsequently turned round and supported the plaintiff's claim.

It appears that the trial of the suit was twice postponed at the instance of the plaintiff and the zemindar. These parties eventually came to a compromise, the terms of which were very favorable to the zemindar. The trial proceeded as against the defendant; and, after a lapse of six weeks from the date of the compromise, the case was decided. The Principal Sudder Ameen held that the kubooleut produced by the plaintiff, in support of the title of his vendor Golabdhee, was a fabrication. He also distrusted the evidence adduced by the plaintiff. The suit was dismissed. On appeal, the Judge of Hooghly, Mr. Hope, agreed with the Principal Sudder Ameen that the plaintiff had entirely failed to prove the kubooleut, or the right to, or possession of, the disputed land by Golabdhee. The decision of the Court of first instance was affirmed.

In special appeal, Mr. Money, the learned Counsel for the special appellant, has asked the Court's permission to add two new grounds of objection to his application for special appeal, and to be heard in support of them under the provisions of Section 374 of the Code of Civil Procedure. I regret I cannot concur with my learned colleague, Mr. Justice Steer, in permitting the learned Counsel to add to his grounds of appeal.

Mr. Money urges that two witnesses cited by the plaintiff have not been examined, and that certain documents filed in another case have not been inspected by the Lower Appellate Court; and he asks us to remand the suit, with directions to the Lower Appellate Court to examine these witnesses, inspect these documents, and decide the case *de novo*. I find that the plaintiff, special appellant, in his appeal to the Lower Appellate Court, did not distinctly ask the Judge to send for and examine these witnesses. In para. 3*rd* of his petition of appeal he stated—"The witnesses who have been examined on my behalf are sufficient; in addition to these, two witnesses, Ram Coomar Sandyal and Radhanath Sircar, were present in Court, but the Lower Court did not examine them." The special appellant did not press the matter on the attention of the Lower Appellate Court, nor did he ever state that these witnesses were cited by him, that they were material witnesses, and that he insisted upon their being examined. The Lower Appellate Court was not asked to send for and inspect the papers which, it is alleged, were filed in another case No. 70. In para. 4 of the petition of appeal to the Lower Appellate Court, it is stated "that the remarks of the Principal Sudder Ameen that the plaintiff, appellant, had failed to file documentary evidence, were incorrect, inasmuch as the plaintiff had asked the Principal Sudder Ameen to inspect the documents filed by him in case No. 70. I would observe that, under Section 138 of the Code of Civil Procedure, it is entirely in the discretion of the Court to send for and inspect the record of another case, either of its own accord, or upon the application of any of the parties to the suit. The plaintiff, special appellant, made no such formal application.

The learned Counsel further urges that the grounds of special appeal were drawn up by a person unacquainted with legal technicalities. But it surely does not require any knowledge of law to enable a suitor to urge that some of his witnesses have not been examined, and that all his documents have not been inspected. Being of opinion that it will not promote the ends of justice to permit the special appellant to add new grounds of objection to his special appeal, unless good cause is shown, which has not been done in this case, I would dismiss the special appeal with costs and interest payable by the special appellant.

Mr. Justice Steer.—The plaintiff, special appellant, sued the defendant, special respondent, for a bit of land. The landlord of the parties was also made a defendant. Both the plaintiff and the landlord had named the same two persons as their respective witnesses. These men were the old amlahs of the landlord, and in a boundary dispute between two ryots of the same estate, were the very best witnesses possible. A summons had been served upon them, and they appeared and were present to be examined whenever required. But the plaintiff and the landlord got the Court to adjourn the case in expectation of coming to a compromise, and they eventually did compromise the dispute. The plaintiff then filed a Safeenamah in which he, representing that he had settled his differences with the landlord,

prayed that the case might proceed against the other defendant. The landlord filed a Razeenamah, and prayed that his witnesses might be discharged, and the Court ordered their discharge. When these papers of compromise were filed, no day was fixed for the hearing of the case against the other defendant; but the Court, without any prior intimation when it intended to take up the case, called it on and dismissed it, holding that the plaintiff had wholly failed to prove his case.

The plaintiff in his petition of appeal to the Judge complained, among other things, that his case was fully proved by the witnesses he had actually produced before the Principal Sudder Ameen, and, if not, that his most important witnesses, the two whom he and his landlord had both named, had not been examined. He represented also that he had intimated to the Principal Sudder Ameen that very material documents on which he partly relied to prove his case were with the record of another case between the same parties, which record and which case was then pending before the same Principal Sudder Ameen, and he prayed the Principal Sudder Ameen to call for these documents as evidence in this case, but he did not do so.

The Judge thought that it was the duty of the plaintiff, if he desired to have the evidence of the two witnesses referred to to be taken, to request the Court to call for them and examine them; but, as he did nothing of the kind, the Judge thought that he could not complain that they were not called and examined. In respect to the conduct of the Principal Sudder Ameen in not calling for the documents out of the record of another case, the Judge takes no notice whatsoever; and finding, as the Principal Sudder Ameen had done, that there was no evidence on the record sufficient to prove the plaintiff's case, he upheld the decision of the Principal Sudder Ameen, and dismissed the plaintiff's appeal.

These two points, the neglect to examine the two witnesses, and the neglect to call for the records, are not made the grounds of complaint in the written petition of special appeal. But Mr. Money, the learned Counsel for the special apellant, asks leave of the Court to be heard on these two points; and I think there are ample reasons for granting the request, inasmuch as, by the course pursued in the Courts below, the plaintiff has decidedly not had a fair trial.

It will be seen that two most important witnesses, who were witnesses for the plaintiff and for his landlord, were, at the sole request of the landlord, allowed to leave the Court. Now, inasmuch as the plaintiff, after he had come to terms with the landlord, expressly desired that the case might proceed against the other defendant, and the two discharged witnesses were witnesses of his as well as of his landlord, these witnesses should not have been discharged at all, but being present, they ought to have been at once examined. If they were discharged by the Court in ignorance that they were witnesses upon whom the plaintiff relied, the Court, when it took up the case again, should not have decided it until the witnesses had been recalled, or the plaintiff had intimated to the Court that the witnesses were not necessary. They had been cited by the plaintiff, and being once present, the Court had no right, without the consent of the plaintiff, to allow them to retire without taking their evidence. To discharge without warrant the most material of the plaintiff's witnesses, and then to rule that he has failed to prove his case, is so manifestly improper and unjust that the Court, I consider, is called upon to take notice of such a matter, for the determination of the Court (*Vide* Section 374 Act VIII of 1859) may be on any ground, whether urged or not, on which a special appeal would lie, and there can be no weightier ground for the Court's interference than that there has not been a fair trial.

If it was incumbent on the Court to call for the two witnesses in question, and to examine them before it proceeded to declare the case of the plaintiff to be devoid of proof, it was still more incumbent on it to call for the documents out of the record of the other pending case. While these were with the record, it was not in the power of the plaintiff to file them; and though the law does not say that a Court is bound to send for papers out of another case, the law does say that every case is to be decided after exhibits have been perused and witnesses examined; and if there was nothing unreasonable in asking the Court to refer to another case for the exhibits upon which reliance was placed, it was not fair towards the plaintiff to decide the case against him without calling for and considering the documentary evidence referred to.

I hold, then, on these two grounds, that the plaintiff has not had a fair trial in the Courts below, and that the case ought to be remanded to the Court of first instance, that the trial may be conducted and completed in a proper legal manner.

The Chief Justice.—Mr. Money applied to this Court for leave to be heard in support of two grounds of objection in addition to those specified in his written grounds of appeal. The learned Judges differed in opinion as to whether he should be allowed to take the objection Section 374 of Act VIII of 1859 enacts that the appellant shall not "without the leave of the Court be heard in support of such an additional objection." As there was a difference of opinion on the point, leave was not given. But, as the whole matter appears upon the record, the Court is not precluded from entering upon it.

The grounds taken were, first, that two witnesses were not examined in the Lower Court. The Judge states that, at the instance of the plaintiff and his zemindar who was one of the defendants, the case was put off several times, and the two witnesses were released from attendance without their evidence being taken. They were witnesses both for the plaintiff and the zemindar, and they were discharged by the Court on the application of the zemindar. These parties, that is,

apparently the plaintiff and the zemindar (who had in the meantime changed sides) prayed that proof might be taken as against Ram Singh, the defendant or special respondent, but did not say what proof they desired to be taken, nor did they say that they wished the above-mentioned two witnesses to be again summoned and their evidence recorded. The Judge adds that no steps of any kind were taken by the plaintiff to procure further evidence, and that he was entirely to blame for any neglect in that respect; and he says that he sees no reason why he should require further evidence to be recorded.

The two witnesses in question were the plaintiff's witnesses. The fact that they had also been summoned at the instance of one of the defendants did not justify the plaintiff in keeping them hanging about the Court for an indefinite time until it suited his convenience to have them examined. We have not the Principal Sudder Ameen's account of the matter, but I have little doubt that he was amply justified in discharging them when he did. But, assuming that he did discharge them improperly at the instance of the zemindar, either forgetting that they were the plaintiff's witnesses, or erroneously supposing that the plaintiff had abandoned all intention of examining them, it was the plaintiff's duty, when he found that they had been discharged, either to apply for a fresh summons, for a postponement of the trial on the ground of their absence as material witnesses who had been summoned by him and discharged by mistake, or to have applied for a review bringing the matter at once to the attention of the first Court, or, if unsuccessful on any or all of such applications, to have appealed expressly on the ground that the Lower Court heard the case in the absence of his most material witnesses.

The plaintiff did nothing of the sort, and one cannot but suspect that he took his chance on such evidence as he had, and failing to succeed on that, now trumps up this tale of injustice.

Then, with respect to the last point, I agree with my learned brother Steer in thinking that, when a proper application is made to a Judge under Section 138 of Act VIII of 1859 to send for from the records of his own Court, papers which would be evidence in the cause before the Court, the Judge has no discretion at all in the matter. I hold that in such a case the Section in question must be treated as giving a power which the Judge is bound to exercise. In Macdougal *versus* Paterson, 11 Common Bench Report 755, and Crake *versus* Powell, 2 Ellis and Blackburn 210, it was attempted to be argued that the word "may" in the 13 and 14 Vict. c. 61 was permissive and *necessarily* gave a discretion. But that notion was repudiated by the Courts of Queen's Bench and Common Pleas, and these Courts laid down the principle that, where a Statute confers an authority to do a judicial act in a certain case, it is imperative on those authorized to exercise the authority when the case arises. Now Section 39 provides for the production of documents in the possession of the parties producing them; Sections 40, 43, and 107 for the enforcing of the production of documents in the possession of the opposite party; Sections 152, 153, 156, 170, 171, and 180 for the production of documents by witnesses and others summoned for that purpose, or ordered to produce them; Section 138 is the only one which directs that proceedings shall be had when the document is in the custody of the Court itself.

The plaintiff at the filing of his plaint should have produced copies of the particular documents relied on by him to show what they were, and stated that the originals were filed in Court in the other suit; he might then have prayed for the production of the originals at that time under Section 39, or at the hearing; and had he done so, the Court would have had no discretion as to whether it would send for the original documents. Had the plaintiff appealed to the Judge on the ground that the facts were, as I have supposed, that the first Court tried his case without sending for his material documents, the judgment of the first Court must have been reversed, and the case remanded with a severe animadversion on the Principal Sudder Ameen for deciding a case without hearing the evidence.

The appellant did, by his fourth ground of appeal, bring to the notice of the Judge the fact that he prayed the Principal Sudder Ameen that the case should be decided with reference to the records of case No. 70, and that his dakhilahs, &c., were filed in that suit. The Judge ought not to have overlooked and disregarded that ground of appeal. He should have dealt with it in some way. And as it is desirable that the claim of a plaintiff should not be rejected without hearing all the material evidence adduced by him, and as in the present case the evidence appears to have satisfied the zemindar who has an interest adverse to that of the plaintiff, I would allow the objections, remand the case for trial, and order that the two witnesses may be examined, and the documents in case No. 70 inspected. But, as the plaintiff is to blame for the miscarriage which has taken place, and particularly so with reference to the omission to examine the witnesses, I would only grant him the remand on payment by him of all the costs of the investigation down to the present time, to which condition Mr. Money has expressed his client's willingness to assent.

The 4th July 1864.

Present:

The Hon'ble C. B. Trevor, C. Steer, and E. P. Levinge, *Judges.*

Jurisdiction—Refund of proceeds of Sale in execution of Decree paid to wrong party under Section 270 Act VIII of 1859.

Case No. 3474 of 1863.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 18th September 1863, reversing a decision passed by

Baboo Doorga Pershad Roy, Moonsiff of that District, dated the 15th July 1863.

Hurish Chunder Sircar (Plaintiff) *Appellant,*

Azimooddeen Shaha and others (Defendants) *Respondents.*

Baboos Mohinee Mohun Roy and *Kalee Kishen Sein* for Appellant.

Baboo Banee Madhub Banerjee for Respondents.

No suit or appeal will lie for a refund of the proceeds of sale realized in execution of a decree, paid to a wrong party by order of a competent Court under Section 270 Act VIII of 1859 (*dissentiente* Levinge, J.)

Mr. Justice Steer.—Hurish Chunder, the plaintiff, sues Azimooddeen, the defendant, for money paid to him by the Sudder Ameen of Rajshahye, under the following circumstances:—

Hurish Chunder held a decree against Dinobundoo given to him by a Moonsiff of the Rajshahye district. In execution, he attached the property of his debtor on the 9th January 1862.

Azimooddeen also held a decree against Dinobundoo given to him by the Sudder Ameen of Rajshahye, and, in execution, he also attached the property of his debtor; but the attachment took place subsequent to the attachment made by Hurish Chunder.

The attached property was sold by the Sudder Ameen, and while the sale proceeds were in deposit in his Court, Hurish Chunder moved the Moonsiff to forward an application on his behalf to the Sudder Ameen that the sale proceeds might be paid to him.

It is not necessary to state on what grounds the Sudder Ameen held that Azimooddeen had a preferential claim to the money over Hurish Chunder, but the fact is that he paid away the money to Azimooddeen.

The present suit is filed to compel Azimooddeen to pay that money to the plaintiff Hurish Chunder.

The question is, does such an action lie?

It may be admitted that Hurish Chunder could not have appealed to the Judge against the order of the Sudder Ameen, as no appeal lay under the law.

It may be admitted also that the Sudder Ameen ought to have paid Hurish Chunder the plaintiff first, as he appears to have been the first to make the attachment.

Still the question is, will a suit lie on the part of Hurish Chunder to compel Azimooddeen to refund the sum paid to him by the Sudder Ameen?

I think no suit will lie.

The law has laid down in Section 270 Act VIII of 1859 a certain rule on the subject, and has left it entirely to the Court to give effect to it. The Court decides, as between rival decree-holders, which ought to be paid first out of the sale proceeds where both have attached the same property. There is no appeal if the money is paid to the wrong party, and there is, to my mind, no remedy by separate action where the money is paid to the wrong party simply by the mistake of law on the part of the Court.

The law has left it in the hands of the Court executing a decree to decide the claims of rival decree-holders to the proceeds of sale realized in execution of decree. A rule is laid down, by which the Court is to decide such claims, but still the decision rests entirely with the Court. If the Court decides wrongly and pays away the money to the decree-holder who had not according to the rule, laid down the first claim to it, still the party receiving it receives it under the authority of a Court having sole jurisdiction in regard to the disposal of the money. A competent Court has given it to him, and he has no right to be harassed with a law-suit for the purpose of making him refund the money.

There are wrongs for which there is no remedy. There is no remedy for a bad judgment of a Court of last resort; and the present case is one of those cases.

Holding that the action will not lie, and the order of the Lower Court being a dismissal of the plaintiff's suit, I would uphold the decision, and dismiss the special appeal with costs.

Mr. Justice Trevor.—It appears to me that the suit of Hurish Chunder against Azimooddeen, to recover the sum of money paid to him erroneously, and by a mistake of law on the part of the Sudder Ameen, will not lie.

As the action is one for money had and received by the defendant to the plaintiff's use, it is necessary that there should be privity between the plaintiff and the defendant, that is, that the defendant should not only have received money, but received it either in fact or by construction of law to the plaintiff's use. Now, privity in fact there clearly is not, the defendant being in no way the agent of the plaintiff, and having received the money in that character. Neither is there any privity by construction of law, the defendant not having received the money from the plaintiff either by fraud or extortion or under a contract followed by total failure of consideration on his part, or under a mistake of fact.

It appears to me, moreover, that, even admitting privity between the plaintiff and defendant, the payment to the defendant was under a mistake of law on the part of the Sudder Ameen, and that, therefore, the action would not be maintainable.

Had the Sudder Ameen been acting entirely out of, or in excess of his jurisdiction, he would be liable in action for damages, which might be measured at the sum paid wrongly to the defendant; but as he acted only erroneously within the scope of his jurisdiction, no action against him will lie, and the plaintiff in the present action has no remedy, there being no appeal against the order of the Sudder Ameen. I concur, therefore, with Mr. Justice Steer, and would dismiss the special appeal with costs.

Mr. Justice Levinge.—It is admitted that the plaintiff obtained his decree first, and that he attached the property of his debtor in due course

of law before the defendant effected his attachment. It is also admitted that the plaintiff was entitled to be first paid. Further, it is conceded that he endeavoured through the medium of the Moonsiff's Court to prevent the abuse of power exercised by the Sudder Ameen, but without avail. It is admitted that the plaintiff could not appeal from the illegal order of the Sudder Ameen, for no appeal is given to parties who are aggrieved by orders directing the distribution or disposition of the proceeds of an execution, unless the question arise between the parties to the suit (*See* Section 11 Act XXIII of 1861). Not only is the right of appeal not given, but it is expressly barred (*Vide* Section 364). I do not think that because a right of appeal is taken away, it follows that a right of suit is lost. On the contrary, the 1st Section of Act VIII of 1859 declares that the Civil Courts are to take cognizance of all suits of a Civil nature with the exception of those expressly barred by Act of Parliament, Regulation or Act of the Council of India. The real matter, therefore, to decide is, can the suit be *maintained* by the plaintiff on the general principles of justice, equity, and good conscience? If the order of the Sudder Ameen was declared by the Act (VIII of 1859) to be final, then it could not be touched, or anything over-reached that was done under, or in pursuance of that order; but when there is no such provision in the Act, why is the plaintiff, who had only a power to protest against that order, who was no party to the suit in which it was made, and who is not prohibited by any express law, to be prevented from bringing a Civil suit to set aside an admittedly illegal order, and to put himself and the defendant in the same position as they stood in, before the illegal order was passed. It is a very strong measure to debar a man of a remedy for a wrong, when he has done every thing that the most exacting tribunal, fettered by the most stringent rules, could possibly demand at his hands.

At the moment the Sudder Ameen gave this fund to the defendant, that fund was by an express declaration of our Legislature, the property of the plaintiff under an attachment made by another Court having concurrent jurisdiction; and no discretion was left to the Sudder Ameen upon which to exercise any judicial function once that he had judicial knowledge of the priority of the attachment. He had then but one legal duty to perform, and that was to pay the fund over to the plaintiff. He could not set aside the order of a Court of concurrent jurisdiction, and give his own attachment order priority. I think under these circumstances his order not being declared final, it can be set aside by this Court as wholly void, and the money recovered from the person withholding it. I think the Court cannot give itself a jurisdiction, in direct opposition to a Statute, to do any act conferring a legal right or title in any one. I think I am justified in saying that the order of the Sudder Ameen was absolutely illegal and void. When the two Courts had concurrent jurisdiction to order the attachment, the Court making the subsequent attachment under its own decree could not give itself jurisdiction to set aside the prior attachment made by the other Court under its decree, and give its own decree and attachment priority over the other. I am averse to quoting cases from our English Law books in the Appellate Court on appeals from the Zillah Courts, where the general law, we administer, is that of equity, justice, and good conscience; but in this case, I cannot refrain from referring to the decision of Lord Kenyon, C. J., in Regina *versus* Sansbury, 4, T. R. 456, in which he says:—"But another question has arisen, and which is "proper should be settled, whether it be *legal* "(for whether it be decent or decorous, no one "can doubt) for two different sets of Magistrates "having a concurrent jurisdiction to run a race "in the exercise of any part of their jurisdiction," and he went on and held that the subsequent acts of the second set of Magistrates were wholly illegal, the jurisdiction of the other set of Justices having first attached, and the whole Court concurred in quashing the subsequent proceedings as *void, and done without jurisdiction.*

This Court is a Court of Equity, bound to do equity, and I trust with full powers to redress an act of injustice. If the effect of granting the relief asked for would be to place the defendant in a worse position than he was in before the order was passed, then possibly it might fairly be contended that the plaintiff must bear the loss occasioned by the order of the Sudder Ameen. But I cannot see that, in granting the relief asked, any wrong would be done to the defendant inasmuch as the Act (Section 270) has declared his exact status, and in that position I would replace him; but I do not think a Court of Equity should permit him to reap the fruits of the advantage he has gained, under an order wholly void and illegal, when the plaintiff has been guilty of no negligence, and when no intervening rights are shown to have accrued. Suppose a right of appeal had been given to the plaintiff of which he had availed himself, and pending that appeal, the Sudder Ameen paid away the money, and supposing the order was reversed on appeal; could not the plaintiff recover back the money paid by the defendant, as money paid without due authority of law and without jurisdiction? I think he could, and that he should have the like relief in a Civil suit (when no appeal is given) in which he has it decreed that the order was illegal. The Sudder Ameen was informed by the plaintiff of his absolute and clear right to receive this money; and I think the Sudder Ameen could not give himself jurisdiction to violate and set at nought the provisions of the law; and I further think it, therefore, equitable to hold that this money having been paid when there was no jurisdiction to give it, should be refunded.

I see no legal bar to the plaintiff's recovering this money in a Court of Equity, although it is possible that if the plaintiff was suing in a *Court of Law* in England, and bound by legal techni-

palities, he might experience some difficultie, as regards his *form of proceeding*. Here he simply asks the Court to declare the order void, and to restore to him the money paid under a void order. In the ordinary action for money had and received by the defendant for the use of the plaintiff, money is commonly recoverable against a perfect stranger, and is continually resorted to to obtain the plaintiff's money wrongfully withheld. For instance, the action is maintainable to recover from a party who has wrongfully received the known and accustomed fees of an office belonging to another; and where the defendant has wrongfully obtained the plaintiff's money for a third party, as by a false pretence, it may be recovered in this form of action. It has been held in Courts of Law in England (Courts, *not of Equity*, but bound by the strict rules of law) that this form of action lies to recover money paid under a *void* authority; and Treby, C. J. held in the case of Sir R. Newdigate *versus* Davy Lord Ryan, 742 " that an action would lie for money paid under the sentence of the Court of High Commissioners; for when money is paid in pursuance of a void authority *indebitatus assumpsit* lies for it." And Lord Mansfield held (*See* Moses *versus* Macfarlane, 2 Bar. 1005) that this form of action was a kind of equitable action, that it lay to get back money " obtained by an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of person under these circumstances."

I admit that I am somewhat distrustful of the judgment I have formed, as I have the misfortune to differ from the opinion formed by my colleagues, and that my error, if error it be, may arise from a misconception of the doctrine of justice, equity, and good conscience that our Appellate Court is bound to apply; but as I fail to see any injustice in holding that the defendant should restore this fund, I think the plaintiff should have the relief he asks. As a general observation, I think that the evil the plaintiff has to complain of should not be without a remedy; and to clear up all doubts, I think that parties, aggrieved by an order of Court under the 270th Section, should be allowed an appeal. I do not think that, in case of a dispute between rival decree-holders as to priority of attachment, the order should be final. I do not think a Court should have the power to declare that A is entitled to a fund in Court, when the law has declared that it belongs to B, and that such a ruling, possibly to the ruin of B, should be incapable of being substantially redressed by the Highest Court in the land. It is not equitable to exclude B from relief, and a right to have his claim established by a higher Court, on the ground that the policy of the law requires that such an order should be final and end all disputes as to who is entitled to the debtor's money, seeing that no dispute or legal contention may ever before have arisen between the different plaintiffs in separate suits, and possibly in different Courts; and I do not see the justice of excluding these parties from both the right of appeal and suit, when aggrieved, when the right of appeal from an order in execution of a decree is given between the parties to the suit; and on reference to the scope of the 246th Section of Act VIII, I think it appears clear that the Legislature did not intentionally mean to shut out decree-holders aggrieved by an order made after attachment of the debtor's property, from the right to contest the validity of the order in a Civil suit.

The 7th July 1864.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. Steer, J. P. Norman, F. B. Kemp, and W. S. Seton-Karr, *Judges*.

Suit for Kubooleut—Notice.

Case No. 2216 of 1862 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 23rd June 1862, reversing a decision of Baboo Gour Chunder Doss Roy, Deputy Collector of that District, dated the 29th January 1861.

Ram Kanth Chowdhry (Defendant) *Appellant*,

versus

Bhoobun Mohun Biswas (Plaintiff) *Respondent*.

Baboo Kishen Succa Mookerjee for Appellant.

None for Respondent.

Held by the majority, (Norman J. dissenting) that a suit for a kubooleut under Clause 1 Section 23 Act X of 1859 will lie, without previous notice under Section 13; the Chief Justice (concurred in by Justice Norman) being of opinion, however, that in this case that question did not arise, inasmuch as, as against the plaintiff, the defendant was a mere trespasser and not a tenant, and that, therefore, the plaintiff could not sue him to obtain a kuboolent under Act X of 1859.

Mr. Justice Kemp.—THE material point for consideration in this reference is, whether a suit for kubooleut under the provisions of Clause 1 Section 23 of Act X of 1859 will lie, without previous notice under Section 13 of the same Act.

I am of opinion no such notice is necessary. This point, I observe, has already been before the Court, and six Judges have concurred in opinion that, when a suit is brought under Clause 1 Section 23 Act X of 1859 for delivery of a kubooleut, no notice is required. (*See* decisions of the late Sudder Court, dated 29th May 1862, and 26th June 1862). Landholders have their rights under the Act as well as ryots, and amongst these rights is the right to receive a kubooleut or counterpart of the pottah. A suit for the delivery of a kubooleut, and for the determination of the rate of rent at which such kubooleut is to be delivered, is cognizable by the Collector and by no other Court. The Collector, in determining the rate of rent at which such kubooleut is to be delivered, will be guided by the provisions of Section 5 of Act X. Again

Section 31 of the Act says that suits for the delivery of kubooleuts, and for the determination of the rate of rent at which such kubooleuts are to be delivered, may be instituted *any time* during the tenancy, thus clearly contemplating that no previous notice which, if the suit be for enhancement of rent, must be given at a particular season of the year, is necessary in a suit for a kubooleut. It is true that "no ryot is liable to pay any higher rent for the land held by him than that payable for the previous year, unless a written notice shall have been served upon him" (Section 13), but this Section does not enact that a suit for a kubooleut and a determination of the rate, which must be fair and equitable (Section 5) at which such kubooleut is to be delivered, cannot be heard and decided without notice under Section 13.

I am supported in the above opinion by the remarks of the learned Chief Justice in the case of Ishur Ghose *versus* James Hills, reported in the September No. for 1862 of the High Court's Decisions, page 356.

I would confirm the decision of the Lower Appellate Court.

The Chief Justice.—This is a suit to fix the rental of one kanee and 12 gundahs of land at the Chowallah rates, and for obtaining a kubooleut from the defendant. The plaintiff alleges that, this land having been secreted by the defendant at the time of a survey and partition, he instituted a suit for possession, and got a decree from the Moonsiff on the 16th of May 1860, under which he was put into possession on the 16th Bhadro (September 1860). This suit was instituted on the 16th of September. The Judge gave the plaintiff a decree for a kubooleut at Rs. 3 per kanee.

As against the plaintiff, the defendant was a mere trespasser and not a tenant, and, therefore, the plaintiff could not sue him to obtain a kubooleut under Act X of 1859. The question whether, as against his tenant, a zemindar can sue for a kubooleut at an enhanced rent without giving notice of enhancement, does not arise.

I think that the decision of the Court below must be reversed.

Mr. Justice Norman.—I entirely agree with Sir Barnes Peacock's judgment.

But as this case was submitted for the purpose of obtaining the opinion of a Full Bench upon the question, *whether a Zemindar who has not given notice of enhancement under Section* 13 *Act X of* 1859 *can maintain a suit for a kubooleut at an enhanced rent*, upon which there are conflicting decisions, and as my learned brothers have given judgments upon the point, in which I regret to say that I cannot concur, I feel bound to state the reasons upon which my conclusion, that such a suit cannot be maintained, is based.

A pottah and a kubooleut are simply a lease and counterpart; in other words, a written statement of terms of the tenancy.

Now there is no common law obligation binding any man to put his agreement into writing, and, therefore, the right to a kubooleut is one which can only be founded on some express enactment. After the passing of Regulation V of 1812, on the 4th September 1816 by Construction 257, the Sudder Court pointed out that that Regulation contained no provisions for a summary suit to compel ryots to take pottahs, and give kubooleuts, and that landholders (as against tenants refusing to take pottahs or give kubooleuts at enhanced rates) might proceed in conformity with Section 5 Regulation IV of 1794, and Sections 9 and 10 Regulation V of 1812.

I believe it is admitted that, if the right exists at present, it must be founded on Act X of 1859.

Sections 2, 3, and 5 of that Act give to ryots the right to demand pottahs under certain circumstances. The right of the landholders to demand a kubooleut is created by Section 9 which is as follows.

"Every person who grants a pottah is entitled to receive, from the person to whom the pottah is granted, a kubooleut, *or counterpart engagement*, in conformity with the terms of the pottah. The tender to any ryot of a pottah, such as a ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kubooleut from such ryot."

Now, upon the plain language of this Section, it seems to me clear that the terms of the holding must be settled, and a pottah embodying such terms must be drawn up and actually tendered to the ryot, before the landholder can acquire a right to call on the ryot to give a kubooleut, or, in other words, execute the counterpart of the pottah tendered to him. It is needless to point out how reasonable and natural is this order of proceeding.

Such being the right as created by the Act, Section 23 does no more than provide a tribunal before which alone disputes relating to such right are to be litigated, and under that Section, if the pottah tendered and the kubooleut demanded are for an enhanced rent, the Collector may of course determine whether notice of enhancement had been duly given, or whether the rent named in the pottah tendered is fair and equitable.

Sections 30, 31, 32, and 33 are simply Clauses regulating the period of Limitation for suits under the Act. Section 31 provides that suits for the delivery of pottahs or kubooleuts, or for the determination of the rates of rent at which they should be delivered, may be instituted *at any time during the tenancy*. That is to say, any rights which the parties may have with reference to such matters may be enforced, not merely in the first or second year, but at any time while the relation of landlord and tenant continues to exist. There is nothing which leads me to infer that Section 31, a mere Limitation Clause, was intended to give any rights inconsistent with, or larger than those created by Section 9.

The question is important, because, if a suit for a kubooleut at an enhanced rate can be maintained without first giving to the ryot notice of enhancement under Section 13, the ryot would

be deprived of the privileges secured to him by Section 13 of Act X, and which he formerly possessed under Sections 9 and 10 Regulation V of 1812.

A Full Bench of this Court has decided in special appeal No. 2463 of 1862 that, in a suit for enhancement, if a mokurreree pottah is set up which the Court find out to be genuine, though the Court may declare the tenure liable to enhancement, it cannot proceed to determine what the rates shall be, unless notice of enhancement under Section 13 has been given. That decision seems to me to conclude the present question.

It is suggested that, treating the suit as equivalent to notice under Section 13, the kubooleut might be made applicable to a period commencing with the year ensuing that in which the plaint was filed. But a suit is not the notice which the Legislature has prescribed; and if it were construed as equivalent, which is a species of interpretation which I do not think legitimate, the suit would be instituted before the cause of action had arisen, and ryots would not only be put to needless expense, but would be liable to be harassed by a litigation as to what should be the terms of an agreement into which they might never choose or even never live to enter These considerations confirm me in the opinion that the construction I put on the several Clauses of the Act referred to by my learned colleagues, is correct.

My opinion is in accordance with the judgment of Sir Barnes Peacock and Mr. Justice L. S. Jackson in Punatoolah Duffadar *versus* Gunga Gobind Roy, 13th March 1863.

I agree with the Judge of the Court below that, in this which was a suit for assessment of rent where no rent had ever been paid, and not for enhancement, no notice of enhancement was necessary under Section 13 of Act X, and, therefore, the question, whether the plaintiff is entitled to a kubooleut as well as to a decree assessing a rent on the land, is not of great importance in the present case.

Mr. Justice Steer.—The only point argued before the Full Bench which heard this case was, whether a notice of enhancement was necessary before an action for a kubooleut could be entertained.

Whether such a question properly arose or not could not now be determined without a re-opening of the case, and without hearing Counsel on that point; and whatever my views might be on the doctrine of trespasser which my learned colleagues, the Chief Justice and Mr. Justice Norman, have held to apply to this case, I could not take upon myself to decide that point without hearing argument upon it.

But both the parties to this suit admit the existence of the tenancy, and I see no reason to raise a contention which they have not thought fit to raise. Regarding the defendant as a tenant, I hold, upon the only argument upon which we were called upon to decide, that a notice under Section 13 Act X of 1859 is not necessary to sustain an action for the determination of rent, and for a kubooleut.

Such a suit, it is clear from the wording of Section 3, will lie, and it is no where said that the suit will not lie unless the preliminary measure of issue of notice has been complied with. Where a landlord claims rent at an enhanced rate, he is bound to show that he has issued the notice prescribed in Section 13, and without it he cannot obtain any enhanced rent prior to the institution of his suit brought to enforce his claim to enhancement. But where a suit is brought to determine the prospective rent, and to obtain a kubooleut after determination of rent, the provision of the law which requires the issue of a notice is supererrogatory and superfluous, for the action does more effectually what the notice is designed to do, *viz.* to advertise the tenant that his landlord expects in future an enhanced rent from him. No doubt, in some cases, a tenant might be prejudiced by a suit being brought against him without the issue of a notice. He would be prejudiced by having to defend a suit where, perhaps, he had no objection to offer to the claim of enhanced rent; but that is not the case in the suit before us, and if it had been the case that a mere notice would have obtained what the action has done, complete relief might have been afforded to the defendant by all the costs of the suit being thrown on the landlord.

In this view, I would uphold the decision of the Lower Court, and dismiss the special appeal, with costs.

Mr. Justice Seton-Karr.—The question which has been referred for decision to a Full Bench in this case is, whether a landlord is entitled to receive a kubooleut from a tenant without issue of notice of enhancement under Section 13 of Act X of 1859, and whether such an action will lie without the issue of such a notice.

I concur with Mr. Justice Kemp in thinking that such a suit will lie, and that no previous issue of notice in such a case is necessary.

The decisions of the late Sudder Court of the 29th of May and 26th of June 1862 seem to be founded on law and justice The suit from its very nature is the very best possible notice of a demand of enhanced rent. It is nowhere stated in Act X that such a suit must be preceded by a notice. It is expressly provided that such a suit (Section 31) may be instituted at any time during the tenancy, and if a landholder chooses rather to bring his tenant into Court at once, and there to settle the question of enhancement which will rarely, if ever, be determined without a formal litigation on the subject, I do not see what there is in law to prevent his following this course.

The case heard on the 23rd of March last, as relied on by Mr. Justice Norman, ended in a remand, and I do not hold the matter now before us to have been conclusively settled by that judgment.

Neither can I see any inconsistency in decreeing enhanced rents only from the commencement of the next Bengalee year or after the end of the month of Cheyt following the decision of the suit in question. The claim to rent or to enhanced rent is a cause of action which may exist or

recur at any time It is the zemindar's right, and does not commence only with the close of Cheyt in such year The mention of this month in Section 13 is designed for the protection of the ryot, and this protection of the latter will be effectually secured, if the enhanced rent be decreed against him only from the termination of the month in question, due notice of the same having been served on him, either by the process described in the latter part of Section 13 or by the more formal, precise, and certain method of a suit in a competent Court

It would seem to be hard on the zemindar to rule that a Collector on an application on plain paper by a landholder, may notify a demand of enhancement to the ryot, but that the same official, when the same demand is preferred on stamped paper and with more formality, is not competent to notify to the ryot that enhanced rent will be demanded from him, the enhancement in either case, running from the commencement of the next year.

Holding these views, I would affirm the decision of the Lower Appellate Court without alteration in any way

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